SUPREME COURT, U. S.

VOLUME I

(Pages 1 to 332)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 636

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., APPELLANTS,

vs.

FRISCO TRANSPORTATION COMPANY.

No. 637

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL., APPELLANTS,

vs.

FRISCO TRANSPORTATION COMPANY.

No. 651

INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

FRISCO TRANSPORTATION COMPANY.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

NOS. 636 AND 637 FILED DECEMBER 3, 1957

NO. 651 FILED DECEMBER 9, 1957

PROBABLE JURISDICTION NOTED FEBRUARY 3, 1957

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[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

Civil Action No. 10272

FRISCO TRANSPORTATION COMPANY, a Corporation, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

COMPLAINT—Filed May 20, 1955

Comes now Frisco Transportation Company, plaintiff in the above entitled cause, and for its cause of action states:

1. Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware and is authorized to do business in the States of Missouri, Arkansas, Kansas, Oklahoma, Texas, Tennessee, and Mississippi, and has its principal office and place of business at 906 Olive Street, St. Louis, Missouri.

2. United States of America is named as defendant pursuant to Section 2322 of the Judicial Code (28 U.S.C.A. §2322).

3. This action is brought to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission (hereinafter called "the Commission") entered on December 7, 1953 (a copy of which is attached hereto and made a part hereof and marked "Exhibit A") in a proceeding bearing the principal caption of MC 89913 Sub 1, Frisco Transportation Company Extension—Joplin-Miami, reported in 62 M.C.C. 367; and an order entered on April 4, [fol. 2] 1955, served upon plaintiff April 21, 1955, denying reconsideration thereof (a copy of which is attached hereto and made a part hereof and marked "Exhibit B"). Jurisdiction of this Court is invoked under Sections 1336, 1398,

2284 and 2321-2325 inclusive of the Judicial Code (28 U.S.C.A. §§1336, 1398, 2284 and 2321-2325), the Interstate Commerce Act (49 U.S.C.A. §1, et seq.), the Fifth Amendment of the Constitution of the United States, and Sections 7, 8 and 10 of the Administrative Procedure Act (5 U.S.C.A. §§1006, 1007 and 1009).

4. Plaintiff is a common carrier by motor vehicle engaged in the transportation of persons and property in interstate and intrastate commerce. As a common carrier by motor vehicle it has for many years past, and is now, transporting property in inter- and intrastate commerce over the highways in and between the States of Missouri, Kansas, Oklahome, Texas, Arkansas, Tennessee and Mississippi. Its interstate business is, and has been, conducted pursuant and subject to the applicable provisions of the Interstate Commerce Act, as amended. With the exception of qualifying shares, plaintiff is a wholly owned subsidiary of St. Louis-San Francisco Railway Company, a common carrier by rail subject to the Interstate Commerce Act.

5. (a) On March 4, 1938, plaintiff entered into an agreement with one Joseph D. Cooper to purchase such motor common carrier operating rights as were then vested in said Joseph D. Cooper by virtue of Section 206 (a) (1) of the Motor Carrier Act of 1935 (49 U.S.C.A. §306 (a) (1)), which said agreement was made subject to the approval of the Commission.

(b) On May 5, 1938, plaintiff filed with the Commission its application to purchase such operating rights and property of Joseph D. Cooper as aforesaid, and said application was assigned number MC-F-578 by the Commission.

[fol. 3] (c) Said application was set for hearing and heard, briefs were filed, and on November 30, 1938, the Commission approved said purchase by its opinion and order reported in 15 M.C.C. 317.

(d) Thereupon, plaintiff, pursuant to the direction of the Commission, adopted the tariffs of its said vendor and otherwise fully complied with applicable statutes, rules and

regulations and undertook a complete motor common carrier operation in the same manner and to the same extent as had said vendor.

(e) On March 11, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor (Cooper) were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued its order in Docket MC 89913 Sub. 3 which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Joseph D. Cooper, the purchase of which by plaintiff was authorized in MC-F-578 as aforesaid, with no restrictions as to the type of motor common carrier service.

(f) In accordance with said order of March 11, 1939, and after finding that plaintiff had complied with applicable statutes, rules and regulations, on March 31, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity which included, inter alia, the aforesaid operating rights without any restriction as to type of motor common carrier service.

6. (a) On April 29, 1938, plaintiff entered into an agreement with one John Hamm to purchase such motor common carrier operating rights as were then vested in said John Hamm by virtue of Section 206(a)(1) of the Motor Carrier [fol. 4] Act of 1935 (49 U.S.C.A. §306(a)(1)), which said agreement was made subject to the approval of the Commission.

(b) On June 28, 1938, plaintiff filed with the Commission its application to purchase such operating rights and property of John Hamm as aforesaid, and said application was assigned number MC-F-618 by the Commission.

(c) Said application was set for hearing and heard, briefs were filed, and on November 30, 1938, the Commission approved said purchase by its opinion and order reported in 15 M.C.C. 320.

(d) Thereupon, plaintiff, pursuant to the direction of the Commission, adopted the tariffs of its said vendor and otherwise fully complied with applicable statutes, rules and regulations and undertook a complete motor common carrier operation in the same manner and to the same extent as had said vendor.

(e) On March 14, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor (Hamm) were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued its order in Docket MC 89913 Sub. 1, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by John Hamm, the purchase of which by plaintiff was authorized in MC-F-618 as aforesaid, with no restrictions as to the type of motor common carrier service.

(f) In accordance with said order of March 14, 1939, and after finding that plaintiff had complied with applicable statutes, rules and regulations, on March 31, 1942, the Commission granted to plaintiff a certificate of public conve- [fol. 5] nience and necessity which included, inter alia, the aforesaid operating rights without any restriction as to type of motor common carrier service.

7. (a) Prior to June 28, 1938, plaintiff entered into an agreement with one J. A. Rose to purchase such motor common carrier operating rights as were then vested in said J. A. Rose by virtue of Section 206(a)(1) of the Motor Carrier Act of 1935 (49 U.S.C.A. §306(a)(1)), which said agreement was made subject to the approval of the Commission.

(b) On June 28, 1938, plaintiff filed with the Commission its application to purchase such operating rights and property of J. A. Rose as aforesaid, and said application was assigned number MC-F-619 by the Commission.

(c) Said application was set for hearing and heard, briefs were filed, and on November 30, 1938, the Commission ap-

proved said purchase by its opinion and order reported in 15 M.C.C. 323.

(d) Thereupon, plaintiff, pursuant to the direction of the Commission, adopted the tariffs of its said vendor and otherwise fully complied with applicable statutes, rules and regulations and undertook a complete motor common carrier operation in the same manner and to the same extent as had said vendor.

(e) On March 15, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor (Rose) were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued its order in Docket MC 89913 Sub. 2 which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority pre-[fol. 6] viously applied for by J. A. Rose, the purchase of which by plaintiff was authorized in MC-F-619 as aforesaid, with no restrictions as to the type of motor common carrier service.

(f) In accordance with said order of March 15, 1939, and after finding that plaintiff had complied with applicable statutes, rules and regulations, on March 31, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity which included, inter alia, the aforesaid operating rights without any restriction as to type of motor common carrier service.

8. (a) On September 1, 1938, plaintiff entered into an agreement with one Joseph W. Parker to purchase such motor common carrier operating rights as were then vested in said Joseph W. Parker by virtue of Section 206(a)(1) of the Motor Carrier Act of 1935 (49 U.S.C.A. §306(a)(1)), which said agreement was made subject to the approval of the Commission.

(b) On September 14, 1938, plaintiff filed with the Commission its application to purchase such operating rights and property of Joseph W. Parker as aforesaid, and said

application was assigned number MC-F-678 by the Commission.

(c) Said application was set for hearing and heard, briefs were filed, and on April 12, 1939, the Commission approved said purchase by its opinion and order reported in 25 M.C.C. 96.

(d) Thereupon, plaintiff, pursuant to the direction of the Commission, adopted the tariffs of its said vendor and otherwise fully complied with applicable statutes, rules and regulations and undertook a complete motor common carrier operation in the same manner and to the same extent as had said vendor.

(e) On June 16, 1939, the Commission, in recognition of [fol. 7] the fact that plaintiff and its predecessor (Parker) were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued its order in Docket MC-89913 Sub. 5 which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Joseph W. Parker, the purchase of which by plaintiff was authorized in MC-F-678 as aforesaid, with no restrictions as to the type of motor common carrier service.

(f) In accordance with said order of June 16, 1939, and after finding that plaintiff had complied with applicable statutes, rules and regulations, on April 18, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity which included, inter alia, the aforesaid operating rights without any restriction as to type of motor common carrier service.

9. (a) On August 31, 1938, plaintiff entered into an agreement with one Louis Tolson to purchase such motor common carrier operating rights as were then vested in said Louis Tolson by virtue of Section 206(a)(1) of the Motor Carrier Act of 1935 (49 U.S.C.A. §306(a)(1)), which said

agreement was made subject to the approval of the Commission.

(b) On September 14, 1938, plaintiff filed with the Commission its application to purchase such operating rights and property of Louis Tolson as aforesaid, and said application was assigned number MC-F-679 by the Commission.

(c) Said application was set for hearing and heard, briefs were filed, and on April 12, 1939, the Commission approved said purchase by its opinion and order reported in 25 M.C.C. 96.

[fol. 8] (d) Thereupon, plaintiff, pursuant to the direction of the Commission, adopted the tariffs of its said vendor and otherwise fully complied with applicable statutes, rules and regulations and undertook a complete motor common carrier operation in the same manner and to the same extent as had said vendor.

(e) On July 10, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor (Tolson) were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued its order in Docket MC 89913 Sub. 6 which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Louis Tolson, the purchase of which by plaintiff was authorized in MC-F-679 as aforesaid, with no restrictions as to the type of motor common carrier service.

(f) In accordance with said order of July 10, 1939, and after finding that plaintiff had complied with applicable statutes, rules and regulations, on April 18, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity which included, inter alia, the aforesaid operating rights without any restriction as to type of motor common carrier service.

10. (a) On August 2, 1939, plaintiff entered into an agreement with one T. N. Bennett to purchase a portion of the interstate motor common carrier operating rights that had been certificated to said T. N. Bennett by the Interstate Commerce Commission, which said agreement was made subject to the approval of the Commission.

(b) On October 17, 1939, plaintiff filed with the Commis- [fol. 9] sion its application to purchase a portion of the operating rights certificated to said T. N. Bennett as aforesaid, and said application was assigned number MC-F-1037 by said Commission.

(c) Said application was set for hearing and heard, briefs were filed, and on March 15, 1940, the Commission approved said purchase. Its memorandum decision is reported in 35 M.C.C. 802.

(d) Thereupon, plaintiff, pursuant to the direction of the Commission, adopted the tariffs of its said vendor and otherwise fully complied with applicable statutes, rules and regulations and undertook a complete motor common carrier operation in the same manner and to the same extent as had said vendor.

(e) On June 13, 1940, after finding that plaintiff had complied with applicable statutes, rules and regulations, the Commission, under Docket MC 89913 Sub. 10 granted to plaintiff a certificate of public convenience and necessity authorizing plaintiff to engage in interstate or foreign commerce as a common carrier by motor vehicle over the portion of operating rights purchased from said T. N. Bennett as aforesaid, without any restriction as to type of motor common carrier service but with the following:

> "The operations herein authorized are subject to such further limitations, restrictions, or modifications as the Commission may hereafter find it necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the St. Louis-San Francisco Railway Company, and shall not unduly restrain competition."

11. On December 20, 1943, March 17, 1948, and December 2, 1948, respectively, the Commission granted certificates to plaintiff covering all the operating rights included within the scope of the prior certificates above described and consolidating the same with other operating rights subsequently acquired by plaintiff in proceedings which are not in issue here.

[fol. 10] 12. All of the operating rights acquired by plaintiff as aforesaid had, for a long time prior to the filing of the respective applications to purchase, been operated by plaintiff's predecessors as complete common carrier services by motor vehicle under motor carrier tariffs, and were acquired by plaintiff as a result of negotiated agreements duly executed covering not only the operating rights of said predecessors (vendors) but also certain physical properties used and useful in the conduct of a motor common carrier business.

13. In each of the above described proceedings before the Commission plaintiff at the initial hearing informed the Commission of its intention to operate the rights so purchased as a complete motor common carrier service for the public, additional to and independent of the rail common carrier service operated by its parent company, as a continuation of the operations that had theretofore been conducted by its predecessors (vendors), and also as a means of transporting railroad billed freight in substitution for its parent company's rail service. After approval of the respective purchases, at every appropriate opportunity plaintiff apprised the Commission that it was operating a complete motor common carrier service for the public, as well as transporting railroad billed freight in substitution for its parent company's rail service.

14. From and after the formal approval by the Commission of each of the above described purchases and the consummation of the purchase transactions aforesaid, and until the present time, plaintiff operated and is operating over the routes aforesaid as a complete motor common

carrier for the public as authorized by the certificates above described.

Plaintiff has since 1938 also expended large sums of money purchasing other operating rights not involved in this case for the purpose of consolidation and unification [fol. 11] with the rights above described, all of which transactions were consummated with the approval of the Commission.

In said operation and to properly effect the same and to properly serve the public, plaintiff has an investment in excess of $1,000,000, and employed in 1954 an average of 464 persons to whom plaintiff paid $1,898,800.17 as wages and salaries. Plaintiff has likewise expended large sums of money in advertising its services to the public and in serving the public with the result that it now handles approximately 180,000 tons of freight annually.

15. (a) On January 4, 1945, the Commission issued its order (a copy of which is attached hereto and made a part hereof and marked "Exhibit C") reopening for reconsideration the proceedings described in Paragraphs 5 to 10, inclusive, of this complaint.

(b) Subsequent thereto an Examiner's proposed report on reconsideration was served upon the parties and exceptions to said proposed report were duly filed. On May 28, 1945, the Commission issued its order (a copy of which is attached hereto and marked "Exhibit D") reopening said proceedings for further hearing.

(c) On March 8, 1946, the Commission entered an order setting the matter for hearing before an Examiner (a copy of which is attached hereto and made a part hereof and marked "Exhibit E").

16. After hearing on said reopening, Examiner's proposed report, exceptions thereto, report and order by Division 5 (53 M.C.C. 802), and oral argument, the Commission issued its report dated December 7, 1953, and order in accordance therewith, as aforesaid. Said report finds that plaintiff's said certificates (except that issued in MC 89913,

Sub 10) "were inadvertently issued," and that such certificates (except that issued in MC 89913, Sub 2) should [fol. 12] be cancelled, and that new or amended certificates should be issued, which would result in diminishing the motor common carrier operating rights held and exercised by plaintiff, and in reducing such operating rights to transportation solely of railroad billed freight in substitution for its parent company, and, in addition thereto, would add further restrictions on its ability successfully to operate and carry on its business.

17. The Commission, in making and issuing said order, exceeded the power and authority delegated to it by the Interstate Commerce Act and erred as a matter of law in the following particulars:

(a) The finding of the Commission that plaintiff's certificates as described above "were inadvertently issued" is not supported by any evidence.

(b) The finding of the Commission and the order issued in accordance therewith, requiring that plaintiff's certificates should be cancelled and new or amended certificates issued as aforesaid, is not supported by the evidence.

(c) The order of the Commission which would result in restricting plaintiff's operations over the routes purchased from John Hamm, Joseph D. Cooper, Joseph W. Parker and Louis Tolson, as aforesaid, to service auxiliary to and supplemental of the train service of its parent rail company, violates the grandfather proviso of Section 206(a)(1) of the Interstate Commerce Act (49 U.S.C.A. §306(a)(1)).

(d) The report and order of the Commission, by requiring that plaintiff's certificates above described be cancelled and new certificates be issued attaching five conditions under which plaintiff's future motor carrier operations must be conducted, violates the National Transportation Policy (49 U.S.C.A. preceding Section 1), Sections 206, 212 and 216 of the Interstate Commerce Act (49 U.S.C.A. §§306, 312 and 316), Sections 7, 8 and 10 of the Administrative [fol. 13] Procedure Act (5 U.S.C.A. §§1006, 1007 and 1009),

and deprives plaintiff of valuable property rights without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

(e) The report and order of the Commission, by requiring that restrictions be placed upon plaintiff's right to operate as a complete motor common carrier after having previously recognized and authorized such unrestricted operations by plaintiff, violates the National Transportation Policy (49 U.S.C.A. preceding Section 1) and deprives plaintiff of valuable property rights without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

(f) The conditions required to be imposed by the report and order of the Commission would destroy unifications of motor common carrier operations duly authorized by the Commission in other proceedings and thereby deprive plaintiff of valuable property rights without due process of law in violation of the Fifth Amendment of the Constitution of the United States and the National Transportation Policy (49 U.S.C.A. preceding Section 1).

(g) The report and order of the Commission would deprive plaintiff of its statutory right to establish reasonable through routes and joint rates with other common carriers by motor vehicle, railroad, express or water, in violation of Section 216 of the Interstate Commerce Act (49 U.S.C.A. §316).

(h) The order reopening the cases heretofore described was not made pursuant to any statutory authority of the Commission, and such reopening and all proceedings thereunder were therefore illegal and beyond the Commission's powers.

[fol. 14] (i) The restrictions which the report and order would impose on rights purchased from T. N. Bennett referred to in Paragraph 10 of this complaint, are not supported by any evidence.

(j) The order of March 8, 1946 (Exhibit E), which comprised the only notice to plaintiff of the hearing to be held

upon reconsideration, was insufficient to apprise plaintiff of the nature and scope of the proceedings which were conducted thereunder, and was insufficient to apprise plaintiff of the nature and scope of the matters which were determined by said report and order of December 7, 1953, and thereby violated the due process clause of the Fifth Amendment to the Constitution of the United States.

(k) The hearing held pursuant to said order of March 8, 1946 (Exhibit E), and all subsequent proceedings and determinations were illegal and conducted without statutory authority, and plaintiff was thereby deprived of a full and complete hearing in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

(l) The report and order dated December 7, 1953, does not comply with the provisions of the Administrative Procedure Act (5 U.S.C.A. 1001, et seq.).

(m) By reason of the foregoing the action of the Commission constitutes an arbitrary, unreasonable and unlawful exercise of its power and is contrary to the established statutory standards which govern the action of the Commission in granting or revoking motor carrier certificates.

18. Plaintiff, in reliance upon the unrestricted certificates issued by the Commission as aforesaid, expended large sums of money in developing its motor common carrier business and has employed, and now employs, many persons in connection therewith. As a result of the operation of its business, plaintiff has in the past, and does now, provide motor common carrier service for countless members [fol. 15] of the shipping and receiving public at various points along its routes of operation. The report and order of the Commission would have the effect of revoking in part the certificates described above and would also render other certificates of plaintiff not here involved of little or no value. Without such certificates plaintiff cannot lawfully continue business in the manner heretofore conducted and will be placed in jeopardy of losing substantial amounts previously invested in its business; substantial numbers of

plaintiff's employes will be in jeopardy of losing their jobs and livelihood; and the communities and shippers served by plaintiff will be forced to make other arrangements for the transportation of their property, where possible, or will be deprived of motor common carrier service.

The losses and potential losses caused or reasonably contemplated to be caused by the report and order and the certificates required to be issued thereby cannot accurately be stated, but will be substantial. Such losses cannot be recovered from any person and the traffic lost by plaintiff as a result of said report and order can never be recovered. The report and order, if allowed to become effective, will result in irreparable damage to plaintiff, its employes, and the shipping public, and will deprive plaintiff of valuable rights in said certificates and of its business lawfully conducted thereunder, and will depreciate plaintiff's revenues by approximately $1,000,000 per annum and will hamper and destroy the usefulness to the shipping public of a long established complete motor common carrier transportation service, and by materially restricting the complete motor common carrier service now rendered by plaintiff to many cities and towns.

19. By reason of all of the foregoing, plaintiff is without an adequate remedy at law.

20. Unless this Court issues a temporary restraining [fol. 16] order restraining the Commission from putting into effect its order of December 7, 1953, and thereafter issues a permanent injunction, as hereinafter prayed, the irreparable damages above described will be caused to plaintiff, its employes, and the shipping public.

Wherefore, plaintiff prays:

1. For convening a three-Judge District Court as required by Sections 2321-2325 and 2284 of Title 28 of the United States Code (28 U.S.C.A. §§2321-2325, 2284).

2. That process may issue against the defendant, United States of America, and thereafter upon not less than five

days notice to the Attorney General of the United States, to the United States Attorney for the Eastern District of Missouri and to the Interstate Commerce Commission, a hearing be held; and an interlocutory injunction be issued staying and suspending the said orders of the Interstate Commerce Commission dated December 7, 1953, and April 4, 1955, copies of which are attached hereto as Exhibits A and B.

3. That because irreparable damage would otherwise ensue to plaintiff, the District Judge to whom this cause is assigned grant a temporary restraining order which, unless previously revoked by said District Judge, shall remain in force until the hearing and determination of the full Court (Title 28, U.S.C.A. §2284(3)).

4. That upon final hearing of this action a permanent injunction issue decreeing that said orders of the Commission are null and void and be set aside, suspended and annulled and their enforcement, execution and operation be forever enjoined, and that the United States of America be restrained from taking any steps or instituting or further prosecuting any proceedings to enforce the aforesaid orders.

[fol. 17] 5. That such other and further relief as may be proper in the premises be granted to plaintiffs.

s/ James L. Homire, s/ John E. McCullough, s/ W. W. Dalton, s/ A. J. Baumann, s/ Ernest D. Grinnell, Jr., Attorneys for Plaintiff, 300 Frisco Building, St. Louis 1, Missouri, Telephone: CHestnut 1-7800.

May 20, 1955.

[fol. 18] *Duly sworn to by Ralph C. Bryant, jurat omitted in printing.*

[fol. 19] EXHIBIT "A" TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of December, A. D. 1953.

No. MC-89913 (Sub-No. 1)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

No. MC-89913 (Sub-No. 2)
FRISCO TRANSPORTATION COMPANY EXTENSION—
HUGO TO PARIS

No. MC-89913 (Sub-No. 3)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-CARTHAGE

No. MC-89913 (Sub-No. 5)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-BLYTHEVILLE

No. MC-89913 (Sub-No. 6)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-WALNUT RIDGE

No. MC-89913 (Sub-No. 10)
FRISCO TRANSPORTATION COMPANY EXTENSION—
BLYTHEVILLE-LAKE CITY

No. MC-F-578
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH D. COOPER

No. MC-F-618
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOHN HAMM

No. MC-F-619
FRISCO TRANSPORTATION COMPANY—PURCHASE—J. A. ROSE

No. MC-F-678
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH W. PARKER

No. MC-F-679.

FRISCO TRANSPORTATION COMPANY—PURCHASE—LOUIS TOLSON

It appearing, That on October 22, 1951, the Commission, division 5, entered its report, 53 M.C.C. 415, and order in the above-entitled proceedings, ordering that certain certificates of public convenience and necessity held by Frisco Transportation Company should be revoked because they were inadvertently issued, and that new or amended certificates should be issued in order to insure that the service rendered thereunder shall in the future be limited to that which is auxiliary to, or supplemental of, rail service;

It further appearing, That by order entered July 7, 1952, upon consideration of the records in the above-entitled proceedings, of petition filed by Frisco Transportation Company, and of the replies filed by certain parties thereto, the said proceedings were reopened for oral argument;

And it further appearing, That full investigation of the matters and things involved in these proceedings has been made; and that the Commission, on the date hereof, has made and filed a report on oral argument herein containing [fol. 20] its findings of fact and conclusions thereon, which report and the aforesaid report and order of October 22, 1951, are hereby referred to and made a part hereof;

It is ordered, That the order of October 22, 1951, be, and it is hereby, vacated and set aside.

It is further ordered, That the certificates heretofore issued to the Frisco Transportation Company in No. MC-89913 (Sub-Nos. 1, 3, 5, and 6) be, and they are hereby, cancelled; and that new or amended certificates be issued in lieu of those cancelled in conformity with the findings in Nos. MC-F-578, MC-F-618, MC-F-678, and MC-F-679, and that all future operations conducted thereunder shall be subject to the limitations or restrictions set forth in appendix B attached to the said report on oral argument.

And it is further ordered, That the certificate heretofore issued to the Frisco Transportation Company in No. MC-

89913 (Sub-No. 10) be modified so as to require that all future operations conducted thereunder shall be subject to the limitations or restrictions as set forth in appendix B attached to the said report on oral argument.

By the Commission:

GEORGE W. LAIRD,
Secretary.

(SEAL)

[fol. 21] EXHIBIT "B" TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of April, A. D. 1955.

No. MC-89913 (Sub. No. 1)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

No. MC-89913 (Sub. No. 2)
FRISCO TRANSPORTATION COMPANY EXTENSION—
HUGO TO PARIS

No. MC-89913 (Sub. No. 3)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-CARTHAGE

No. MC-89913 (Sub. No. 5)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-BLYTHEVILLE

No. MC-89913 (Sub. No. 6)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-WALNUT RIDGE

No. MC-89913 (Sub. No. 10)
FRISCO TRANSPORTATION COMPANY EXTENSION—
BLYTHEVILLE-LAKE CITY

No. MC-F-578
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH D. COOPER

No. MC-F-618
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOHN HAMM

No. MC-F-619
FRISCO TRANSPORTATION COMPANY—PURCHASE—
J. A. ROSE

No. MC-F-678
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH W. PARKER

No. MC-F-679
FRISCO TRANSPORTATION COMPANY—PURCHASE—
LOUIS TOLSON

Upon consideration of the records in the above-entitled proceedings, and of:

(1) Petition of applicant, dated February 2, 1954, for reconsideration of the Commission's report on oral argument of December 7, 1953;

(2) Joint reply of American Trucking Associations, Inc., and the Regular Common Carrier Conference, interveners in opposition, filed February 15, 1955;

(3) Joint reply of Be-Mac Transport Co., Inc., Consolidated Forwarding Co., Inc., Viking Freight Company, C. E. S. Truck Lines, Inc., L. A. Tucker Truck Lines, Inc., and Southern-Plaza Express Company, Inc., interveners in opposition, dated February 11, 1955;

[fol. 22] (4) Reply of Campbell Sixty-Six Express, Inc., intervener in opposition, dated February 11, 1955;

(5) Petition of Southern-Plaza Express Co., Inc., for leave to intervene and for leave to adopt the reply filed by Be-Mac Transport Co., Inc., referred to in (3) above;

and good cause appearing therefor:

It is ordered, That said petitioner, Southern-Plaza Express Co., Inc., be, and it is hereby, permitted to intervene

in said proceedings with the right to appear and participate in all further proceedings herein;

It is further ordered, that Southern-Plaza Express Co., Inc., be, and it is hereby, permitted to adopt the reply of Be-Mac Transport Co., Inc., et al.;

It is further ordered, That said petition for reconsideration be, and it is hereby, denied, for the reason that the petition raises no issue of law or fact requiring a change in the findings in the report or oral argument, decided December 7, 1953.

By the Commission.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 23] EXHIBIT "C" TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 4th day of January, A. D. 1945.

No. MC 89913 (Sub No. 1)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

No. MC 89913 (Sub No. 2)
FRISCO TRANSPORTATION COMPANY EXTENSION—
HUGO TO PARIS

No. MC 89913 (Sub No. 3)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-CARTHAGE

No. MC 89913 (Sub No. 5)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-BLYTHEVILLE

No. MC 89913 (Sub No. 6)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-WALNUT RIDGE

No. MC 89913 (Sub No. 10)
FRISCO TRANSPORTATION COMPANY EXTENSION—
BLYTHEVILLE-LAKE CITY

No. MC-F-578
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH D. COOPER

No. MC-F-618
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOHN HAMM

No. MC-F-619
FRISCO TRANSPORTATION COMPANY—PURCHASE—
J. A. ROSE

No. MC-F-678
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH W. PARKER

No. MC-F-679
FRISCO TRANSPORTATION COMPANY—PURCHASE—
LOUIS TOLSON

Upon consideration of the records in the above-entitled proceedings, and good cause appearing therefor:

It is ordered, That the said proceedings be, and they are hereby, reopened for reconsideration;

It is further ordered, That an examiner's proposed report on reconsideration be served on the parties;

And it is further ordered, That, if any party to the proceedings desires a further hearing before the issues are reconsidered by the said Division, a petition for further hearing may be filed before the expiration of the time for filing exceptions to the proposed report of the examiner.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

[fol. 24] EXHIBIT "D" TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 28th day of May, A. D. 1945.

No. MC 89913 (Sub No. 1)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

No. MC 89913 (Sub No. 2)
FRISCO TRANSPORTATION COMPANY EXTENSION—
HUGO TO PARIS

No. MC 89913 (Sub No. 3)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-CARTHAGE

No. MC 89913 (Sub No. 5)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-BLYTHEVILLE

No. MC 89913 (Sub No. 6)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-WALNUT RIDGE

No. MC 89913 (Sub No. 10)
FRISCO TRANSPORTATION COMPANY EXTENSION—
BLYTHEVILLE-LAKE CITY

No. MC F 578
FRISCO TRANSPORTATION COMPANY PURCHASE—
JOSEPH D. COOPER

No. MC-F 618
FRISCO TRANSPORTATION COMPANY PURCHASE—
JOHN HAMM

No. MC F 619
FRISCO TRANSPORTATION COMPANY PURCHASE—
J. A. ROSE

No. MC F 678
FRISCO TRANSPORTATION COMPANY PURCHASE—
JOSEPH W. PARKER

No. MC F 679
FRISCO TRANSPORTATION COMPANY PURCHASE—
LOUIS TOLSON

Upon consideration of the records in the above-entitled proceedings, and of petition of Frisco Transportation Company, dated March 29, 1945, for hearing; and good cause appearing therefor:

It is ordered, That said proceedings be, and they are hereby reopened for further hearing at a time and place to be hereafter fixed.

By the Commission, Division 5.

W. P. Bartel,
Secretary.

(Seal)

[fol. 25] Exhibit "E" to Complaint

Order

Interstate Commerce Commission

No. MC 89913 Sub 1
Frisco Transportation Company Extension—
Joplin-Miami

No. MC 89913 Sub 2
Frisco Transportation Company Extension—
Hugo to Paris

No. MC 89913 Sub 3
Frisco Transportation Company Extension—
Joplin-Carthage

No. MC 89913 Sub 5
Frisco Transportation Company Extension—
Memphis-Blytheville

No. MC 89913 Sub 6
Frisco Transportation Company Extension—
Memphis-Walnut Ridge

No. MC 89913 Sub 10
Frisco Transportation Company Extension—
Blytheville-Lake City

No. MC-F-578
Frisco Transportation Company—Purchase—
Joseph D. Cooper

No. MC-F-618
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOHN HAMM

No. MC-F-619
FRISCO TRANSPORTATION COMPANY—PURCHASE—
J. A. ROSE

No. MC-F-678
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH W. PARKER

No. MC-F-679
FRISCO TRANSPORTATION COMPANY—PURCHASE—
LOUIS TOLSON

PRESENT: William E. Lee, Commissioner, to whom the matters which are the subject of this order have been assigned for action thereon.

It appearing, That the above-entitled matter is one which the Commission is authorized by the Interstate Commerce Act, to refer to an examiner:

It is ordered, That the above-entitled matter be, and it is hereby, referred to Examiner W. T. Croft for further hearing on the 8th day of April. A. D., 1946, at 9:30 o'clock a. m. at the Hotel Pickwick, Kansas City, Missouri, and for recommendation of an appropriate order thereon accompanied by the reasons therefor, unless the parties to the proceeding agree to the omission of such recommended order;

It is further ordered, That applicant shall make available at the hearing a competent witness or witnesses for examination on all material and relevant facts recited in the application;

It is further ordered, That in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted;

[fol. 26] *It is further ordered,* That notice of this proceeding be duly given;

And it is further ordered, That any party desiring to be notified of any change in the time or place of the said hearing (at his own expense if telegraphic notice becomes necessary) shall inform the Interstate Commerce Commission, Washington, D. C., to that effect by notice which must reach the Commission within ten days from the date of service hereof and that the date of mailing of this order shall be considered as the time when the order is served.

Dated at Washington, D. C., this 8th day of March, A. D. 1946.

By the Commission, Commissioner Lee.

W. P. BARTEL,
Secretary.

(SEAL)

[fol. 27] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN JUDICIAL DISTRICT OF MISSOURI, EASTERN DIVISION

[Title omitted]

ORDER APPOINTING TWO ADDITIONAL JUDGES TO CONSTITUTE THREE-JUDGE DISTRICT COURT—May 27, 1955

Pursuant to Section 2284(1) of Title 28 of United States Code (28 U.S.C.A. Sec. 2284(1) and notice filed with me by the Honorable George H. Moore, United States District Judge in the above entitled Court, and it appearing that the above entitled action is brought to enjoin, set aside and annul the orders of the Interstate Commerce Commission entered on December 7, 1953, and April 4, 1955, in a proceeding pending before said Interstate Commerce Commission, bearing the principal caption of MC 89913 Sub 1; Frisco Transportation Company Extension—Joplin-Miami, reported in 62 MCC 367, because said orders are illegal and therefore null and void, and in violation of the Constitution of the United States, I hereby designate as additional Judges to sit with the said Honorable George H. Moore, United States District Judge for the Eastern District of Missouri, to hear and determine the above entitled action

and the application for an interlocutory injunction therein, the Honorable Martin D. Van Oosterhout, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, and the Honorable Rubey M. Hulen, United States District Judge for the Eastern District of Missouri.

Dated May 27th, 1955.

Archibald K. Gardner, Chief Judge, United States Court of Appeals for the Eighth Circuit.

[fol. 28] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

[Title omitted]

INTERVENTION OF THE INTERSTATE COMMERCE COMMISSION—Filed July 15, 1955

TO THE HONORABLE THE JUDGES OF SAID COURT:

In accordance with the provisions of Section 2323, Title 28, U. S. Code, we hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of ourselves as its counsel, in the above-entitled action.

Samuel R. Howell, Acting General Counsel, C. H. Johns, Assistant General Counsel.

[fol. 29] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

[Title omitted]

ORDER RE INTERVENTION—September 30, 1955

The Court having before it the petitions of Be-Mac Transport Co., Inc., Viking Freight Co., C.D.S. Truck Lines, Inc., L. A. Tucker Truck Lines, Inc., Consolidated Forwarding Co. Inc., American Trucking Associations, Inc.,

and Regular Common Carrier Conference of American Trucking Associations, Inc. to intervene as parties defendant in the above-entitled cause, and it appearing that it is desirable that said petitions be argued before the full three-judge court, the Court, therefore, DOTH ORDER that the submission of said petitions to intervene be and the same is hereby vacated, and hearing for said petitions to intervene will be set at a later date.

Dated this 30th day of September, 1955.

Geo. H. Moore, United States District Judge.

[fol. 30] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

[Title omitted]

ORDER SUSTAINING PETITIONS TO INTERVENE AND DIRECTING THE FILING OF AMENDED PLEADINGS BY THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION—Filed March 14, 1956

The petitions to intervene as parties defendant of Be-Mac Transport Co., Inc.; Viking Freight Company; C. E. S. Truck Lines, Inc.; L. A. Tucker Truck Lines, Inc.; Consolidated Forwarding Company, Inc.; Interstate Commerce Commission; American Trucking Associations, Inc., and its Regular Common Carrier Conference; Railway Labor Executives' Association, and the Brotherhood of Railroad Trainmen and the Order of Railway Conductors & Brakemen of America; and Campbell "Sixty-Six" Express, Inc.; in the above entitled cause, are each sustained.

ORDER ON MOTION OF PLAINTIFF TO STRIKE CERTAIN PORTIONS OF ANSWERS OF THE DEFENDANT UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, INTERVENOR

To dispose of the two motions filed by the plaintiff to strike certain portions of the answers of the United States

of America and the Interstate Commerce Commission we will treat as having for their purpose to cause the last two named parties to file a pleading in conformity to the Federal Rules of Civil Procedure and as so construed said motions will be sustained and defendant United States of America and intervenor Interstate Commerce Commission will, within ten days of the filing hereof, file an amended pleading in lieu of the present pleading and such amended pleading will be filed in accordance with the provisions of Rule 8(b), Federal Rules of Civil Procedure.

M. D. Van Oosterhout, United States Circuit Judge.
Geo. W. Moore, United States District Judge.
Rubey M. Hulen, United States District Judge.

[fol. 31] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

(Stamp) Filed—Mar 14 1956—James J. O'Connor, Clerk

FRISCO TRANSPORTATION COMPANY, a Corporation, Plaintiff

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

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ANSWER OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND ITS REGULAR COMMON CARRIER CONFERENCE, INTERVENING DEFENDANTS—Lodged July 19, 1955, James J. O'Connor, Clerk.

Come now intervening defendants, American Trucking Associations, Inc., and its Regular Common Carrier Conference, and as their answer to the complaint respectfully say:

I

Intervening defendants admit the allegations of paragraphs 1, 2, and 3 of the complaint.

II

Intervening defendants admit the allegations of paragraph 4 of the complaint except that intervening defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff has conducted its interstate business pursuant to applicable provisions of the Interstate Commerce Act.

III

Intervening defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5, 6, 7, 8, 9 and 10 of the complaint except that intervening defendants admit that the Interstate Commerce Commission issued to the complainant the specified certificates of public convenience and necessity following complainant's purchases of certain motor-carrier operating authorities as [fol. 32] approved by the commission in finance proceedings, captioned and reported as indicated, in each of which proceedings the Commission noted that the complainant sought the authority to render rail-truck coordinated service and subjected its approval to such limitations or restrictions as the Commission in the future might find necessary to impose to insure that the service would be auxiliary and supplementary to the train service of the parent St. Louis-San Francisco Railway Company.

IV

Intervening defendants allege that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 11, 12, 13 and 14.

V

Intervening defendants admit the allegations of paragraphs 15 and 16 except that intervening defendants deny that the new or amended certificates proposed to be issued pursuant to the Commission's report and order assailed herein would in any way diminish or reduce the motor-common-carrier operating rights for which the complainant,

Frisco Transportation Company, applied originally and which were sought to be awarded by the Commission.

VI

Intervening defendants deny the allegations of paragraph 17 of the complaint. Affirmatively, intervening defendants allege that complainant was accorded due process of law in that it was fully apprised of the nature and scope of the proceedings before the Interstate Commerce Commission and in that it was not deprived of property by the Commission's exercise of a reserved right subject to which complainant's investments were made in the beginning. Furthermore, intervening defendants allege that the Commission properly exercised the reserved right notwithstanding that such exercise limited or restricted the scope of the motor-carrier authorities purchased by the complainant.

VII

Intervening defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the complaint.

VIII

As a further defense intervening defendants admit that in each of the subject finance proceedings the complainant, Frisco Transportation Company, disclosed a desire, if permitted to do so, to continue all-motor service independently [fol. 33] of the railroad, but intervening defendants say that in each such proceeding the Transportation Company built its case primarily on the parent railroad's need for an auxiliary motor service which would enable it to improve its less-than-carload rail freight service and upon the public benefits to be derived from a coordinated motor-rail service. In each case the Commission, Division 5, followed then well-established precedents in disapproving the proposed independent all-motor operations and approved the proposed acquisitions only to enable the Transportation Company to perform service auxiliary to or supplemental of the rail

service of the parent railroad, as is abundantly shown by the discussion in each report. In each instance, the finding that the purchase would be consistent with the public interest was clearly predicated upon the showing that the "railroad" would be enabled thereby to use service by motor vehicle to public advantage in its "rail operations". It is clear that the purchases were approved for no other purpose and the reports in each case clearly imply an intent and expectation that all-motor operations not in aid of the rail service would not be undertaken. Relying upon its declaration of its intent and expectation the Division did not deem it necessary to impose specific conditions limiting the character of the future operations, but to insure against the rendition by the Transportation Company of any other type service than that intended, the approval of the purchase was made subject in each instance, to the unequivocal reservation of a right later to impose conditions should they be found necessary to prevent, in effect, a deviation by the Transportation Company from the auxiliary or supplementary service intended to be allowed despite what the Transportation Company might have hoped for respecting the performance of all-out motor-carrier service. Only by reading into these reports language that is not there can it be concluded that such an operation was even seriously considered, much less approved.

IX

As a further defense intervening defendants state that the certificates issued pursuant to the *Hamm, Rose, Cooper, Parker* and *Tolson* purchases, being based of necessity upon the findings in the finance proceedings, could not expand the scope of the operation to be performed by the complainant beyond those authorized by Division 5 in the finance proceedings. To the extent that the certificates issued failed to reflect the character of authority contemplated by the findings, such deficiency or deviation from the findings was inadvertent, and, consequently, the certificates, departing as they did from the findings in the finance reports, were erroneously issued.

[fol. 34]

X

As a further defense intervening defendants state that it was within the powers of the Interstate Commerce Commission to take official notice of its administrative procedures and practices, to note officially that the certificates in question were erroneously issued and to rectify the error by reopening the applicable proceedings in its discretion for the purpose of issuing corrected or new certificates, without complying with the provisions of Section 212(a) of the Interstate Commerce Act.

XI

As a further defense intervening defendants state that the certificates were not any the less erroneously issued because they conformed to the compliance orders, which, like the certificates, were issued without the reservation of the right of the Commission to impose such further restrictions as may be necessary to insure that the service of the complainant, Frisco Transportation Company, remain auxiliary and supplementary to the train service of the parent railroad. The compliance orders, as the certificates, being dependent upon the authorizations of the finance proceedings, could not eliminate this condition from the findings in the finance proceeding. The error occurred first in the compliance order. The compliance orders were merely preliminary orders of an interim nature which the Commission was empowered to enter after summary procedure, which remained under the control of the Commission, and which the Commission had lawful authority in its discretion to set aside and vacate with or without notice to petitioner. The certificates gain nothing from having been issued in the terms of the compliance orders.

XII

As a further defense the intervening defendants state that the complainant, Frisco Transportation Company, is seeking to profit from a clerical error. The reports under consideration permit of no doubt that the purchases were approved, not for the purpose of permitting the Frisco Transportation Company to engage in all-motor operations

independent of its proprietary railroad, but solely to enable it to render a service auxiliary of or supplementary to the rail service. This intent was neither obscurely nor uncertainly shown, for in each instance the tenor of the Commission's discussion and the specific reservations in the findings of the right to add restrictions for that purpose clearly disclosed what was being approved. That the resultant certificates were erroneously issued cannot accrue to the benefit of the Transportation Company.

[fol. 35] XIII

As a further defense intervening defendants state that motor-carrier protestants, as well as other motor carriers who would have protested, relied on the representation of the complainant, Frisco Transportation Company, made in the finance proceedings that the purpose of the acquisitions was to render auxiliary and supplemental service. If the plaintiff were to prevail, these motor carriers would find themselves confronted by a railroad subsidiary authorized to conduct unrestricted all-motor operations, backed by the financial and other resources of the parent railroad company. They would find themselves in competition with a carrier the operations of which they were not prepared to cope with and against which they had had no opportunity to protest.

XIV

As a further defense intervening defendants state that there has been no showing of a need for the unrestricted motor carrier service which the complainant, Frisco Transportation Company, seeks to render. The independent motor carriers serving the area are rendering an adequate service, and there is no evidence of record of a need for additional service to be rendered by the Frisco Transportation Company.

XV

As a further defense intervening defendants state that the conditions which the Interstate Commerce Commission seeks to impose on the certificates are the same as have

usually been imposed by the Commission to restrict the motor-carrier service of a railroad subsidiary to that which is auxiliary and supplementary to the train service of the parent railroad. Section 5(2)(b) of the Interstate Commerce Act requires the imposition of auxiliary and supplemental restrictions where, as here, a railroad directly or through a subsidiary company purchases the motor carrier operating rights of an independent company. This is so regardless of whether the operating rights of the independent company were acquired through grandfather application under Section 206 of the Act or whether the rights were acquired since the "grandfather" date by application under Section 207.

[fol. 36] Wherefore, intervening defendants pray that the relief sought by the plaintiff be denied and that the complaint be dismissed.

Respectfully submitted,

American Trucking Associations, Inc.

/s/ B. W. LaTourette, 907 Boatmen's Bank Building, 314 North Broadway, St. Louis 2, Missouri.

/s/ Peter T. Beardsley, /s/ Fritz R. Kahn, 1424 Sixteenth Street, N.W., Washington 6, D. C., Its Attorneys.

Regular Common Carrier Conference

/s/ B. W. LaTourette, 907 Boatmen's Bank Building, 314 North Broadway, St. Louis 2, Missouri.

/s/ Robert J. McBride, /s/ Albert B. Rosenbaum, 1424 Sixteenth Street, N.W., Washington 6, D. C., Its Attorneys.

[fol. 37] Certificate of service (omitted in printing).

[fol. 38] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

[Title omitted]

ANSWER OF THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.—Filed March 14, 1956

Come now intervening defendants, Railway Labor Executives' Association, comprised of eighteen standard national and international railway labor organizations, and Brotherhood of Railroad Trainmen and Order of Railway Conductors & Brakemen of America, standard international railway labor organizations, and as their answer to the complaint say:

I

Intervening defendants admit the allegations of paragraphs 1, 2 and 3 of the complaint.

II

Intervening defendants admit the allegations of paragraph 4 of the complaint except that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff has conducted its business pursuant to the applicable provisions of the Interstate Commerce Act.

III

Intervening defendants allege that they are without knowledge or information sufficient to form a belief as to [fol. 39] the truth of the allegations contained in paragraphs 5, 6, 7, 8, 9 and 10 of the complaint, except that intervening defendants admit that plaintiff received from the Interstate Commerce Commission certificates of public convenience and necessity as specified in the complaint subsequent to the Commission's approval of plaintiff's purchases of certain motor-carrier operating authorities in finance proceedings.

IV

Intervening defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 11, 12, 13 and 14 of the complaint.

V

Intervening defendants admit the allegations of paragraphs 15 and 16 of the complaint except that they deny that the new or amended certificates are proposed by the Commission's order challenged herein would result in diminishing or reducing the motor common carrier operating rights held by plaintiff, and to aver that intervening defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph 16 that the above mentioned new or amended certificates would add further restrictions on plaintiff's ability successfully to operate and carry on its business.

VI

Intervening defendants deny each and every allegation of paragraph 17 of the complaint.

VII

Intervening defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the complaint.

[fol. 40]

VIII

As an additional and separate defense, intervening defendants aver that Section 5(2)(b) of the Interstate Commerce Act, as amended, requires the imposition of conditions restricting the motor carrier operations of a rail carrier or its subsidiary to those which are auxiliary to or supplemental of the railroad operations. The intervening defendants further aver that Section 5(2)(b) requires the imposition of such conditions regardless of whether the operating rights purchased by the rail carrier or its subsidiary had

previously been acquired through grandfather application under Section 206 of the Interstate Commerce Act or whether such rights were acquired subsequent to the "grandfather" date by application under Section 207.

IX

(a) As a second additional and separate defense, intervening defendants aver that in each of the finance proceedings referred to in the complaint Division 5 of the Commission approved the proposed acquisitions of plaintiff only to the extent that plaintiff would perform service auxiliary to or supplemental of the rail service of its parent railroad. Intervening defendants further allege that no other inference can be drawn from the language of the reports of the Commission in approving the acquisitions involved.

(b) Intervening defendants further aver that the certificates issued in the *Hamm, Rose, Cooper, Parker,* and *Tolson* purchases could not result in authorization of operations of broader scope than those contemplated by the Commission in the finance proceedings since the issuance of such certificates was based upon the findings reached in the finance proceedings. Intervening defendants further aver that any discrepancies between the findings of Division 5 in the finance proceedings and the certificates as issued [fol. 41] clearly reflect inadvertence on the part of the Commission insofar as such certificates departed from the clear intent of the Commission as expressed in the reports of the finance proceedings and, therefore, such certificates were issued erroneously.

(c) Intervening defendants further aver that the Interstate Commerce Commission has the power to take notice of and to correct errors of the type here involved committed during the course of a proceeding, without complying with the provisions of Section 212(a) of the Interstate Commerce Act.

Wherefore, intervening defendants pray that the relief sought by the plaintiff be denied and that the complaint be dismissed.

Respectfully submitted,

Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, and Order of Railway Conductors & Brakemen of America.

/s/ Carroll J. Donohue, 506 Olive Street, St. Louis 1, Missouri.

/s/ Edward J. Hickey, Jr., Clarence M. Mulholland, William G. Mahoney, 620 Tower Building, Washington 5, D. C.

Of Counsel: Salkey & Jones, 506 Olive Street, St. Louis 1, Missouri.

Mulholland, Robie & Hickey, 620 Tower Building, Washington 5, D. C.

Dated: August 18, 1955

[fol. 42] Certificate of service (omitted in printing).

[fol. 43] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

[Title omitted]

ANSWER OF CAMPBELL "SIXTY-SIX" EXPRESS, INC.— Filed March 14, 1956

Comes now intervening defendant, Campbell "Sixty-Six" Express, Inc. and for its answer to the Complaint of the plaintiff herein respectfully states:

I

The allegations contained in paragraphs 1, 2, and 3 of the Complaint are admitted.

II

Intervening defendant states that it is without sufficient knowledge either to affirm or deny the allegations in para-

graph 4 concerning the conduct of the interstate business of the plaintiff; the rest of the allegations contained in paragraph 4 of the Complaint are admitted. Intervening defendants state that with regard to paragraphs 5, 6, 7, 8, 9 and 10 of the Complaint herein it is without sufficient knowledge or information to affirm or deny the allegations contained therein. Intervening defendant does, however, admit that the Interstate Commerce Commission did issue [fol. 44] to the complainant the specified certificates of public convenience and necessity following complainant's purchases of certain motor carrier operating authorities as approved by the Interstate Commerce Commission in the referred to finance proceedings, in each of which proceedings the Commission noted that the complainant sought the authority to render rail-truck coordinated service and subjected its approval to such limitations, or restrictions as the Commission in the future might find necessary to impose to insure that the service would be auxiliary and supplementary to the train service of the parent railroad.

III

Intervening defendant alleges that it is without sufficient knowledge or information to affirm or deny the allegations contained in paragraphs 11, 12, 13 and 14 of the Complaint herein.

IV

Intervening defendant admits the allegations of paragraphs 15 and 16 except that it is specifically denied that the new or amended certificates proposed to be issued pursuant to the Commission's Report and Order assailed herein would in any way diminish or reduce the motor common carrier operating rights for which the complainant originally applied and which were sought to be awarded by properly entered orders of the Interstate Commerce Commission.

V

Intervening defendant denies the allegations of paragraph 17 of the Complaint herein. Intervening defendant

specifically alleges that the actions of the Interstate Commerce Commission assailed by the complainant were supported by ample evidence of record and that complainant had full notice and knowledge of the nature and scope of [fol. 45] the proceedings before the Interstate Commerce Commission and that it was not deprived of any property right as a result of the action of the Interstate Commerce Commission and that the actions of the Interstate Commerce Commission were properly authorized by applicable statutes.

VI

Intervening defendant states that it is without sufficient knowledge or information to either affirm or deny the allegations contained in paragraph 18 of the Complaint herein. Intervening defendant affirmatively avers that in each of the subject finance proceedings the complainant indicated a desire to continue all-motor service independent of the railroad but that the complainant built its case in each proceeding primarily on the parent railroad's need for an auxiliary motor service which would enable it to improve its less than carload rail freight service and upon the public benefits to be derived from a coordinated motor-rail service. In each proceeding Division 5 of the Interstate Commerce Commission followed long established precedents in disapproving the proposed independent all-motor operations and approved the proposed acquisitions only to enable the complainant to perform service auxiliary to or supplemental of the rail service of the parent railroad. Approval of the purchases by the complainant was conditioned upon a showing that the railroad would be enabled thereby to use service by motor vehicle to public advantage in its rail operations. The purchases were approved for no purpose other than to allow use of the motor carrier authorities as an auxiliary or supplement to rail service. The complainant could only have acquired authority consonant with the orders of the Commission granting the purchases and to the extent that the certificates deviated from the specific and explicit findings of the purchase orders they were inadvertently and erroneously issued.

[fol. 46]

VII

It is further affirmatively alleged that the Interstate Commerce Commission never intended and does not now intend for the complainant to conduct under the certificates involved herein any motor carrier service other than that which is auxiliary to or supplemental of the freight train service of the railroad affiliate and that the fact that the certificates as issued followed the form of the compliance orders is immaterial. The Interstate Commerce Commission is well within its powers in taking official notice of its administrative procedures and practices and in noting that the compliance orders and the certificates based thereon were erroneously issued. The compliance orders were merely preliminary orders which the Commission was empowered to enter and they remained under the control of the Commission with full authority to set aside or vacate them without notice.

VIII

It is affirmatively averred that the complainant herein having had full knowledge of the intent of the Commission through its clearly issued orders in each of the subject proceedings is now attempting to profit from an inadvertent clerical type of error and that if the complainant has expanded its resource based upon its own decision to ignore the mandate of the Interstate Commerce Commission it has done so with full knowledge of the consequences and cannot now be heard to complain of the natural result of those consequences. The complainant herein has made no showing of a need for the unrestricted motor carrier service which it seeks to render. Independent motor common carriers are rendering a full and complete service in the area involved and there is no substantiation of the claim of the complainant for a right to perform that service or a need for its [fol. 47] performance.

IX

The motor common carriers who are performing a complete service in the territory involved in this matter are

entitled under the National Transportation Policy to protection from all out and unrestricted motor operations by a rail affiliate. These motor common carriers relied upon the original presentations of the complainant in the various finance proceedings involved herein that the purpose of the acquisitions was to render auxiliary and supplemental service. The type of service now claimed by the complainant is a far cry from this and is a matter against which the interested parties have had no opportunity to protest.

Wherefore, intervening defendant prays that the relief sought by the complainant be denied and that the complaint be dismissed.

s/ Milford T. English, Suite 1605-07, 506 Olive Street, St. Louis 1, Missouri, s/ Lee Reeder, s/ Wentworth E. Griffin, Suite 1010, 1012 Baltimore Avenue, Kansas City 5, Missouri.

[fol. 48] Certificate of service (omitted in printing).

[fol. 49] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

[Title omitted]

AMENDED ANSWER OF THE UNITED STATES OF AMERICA— Filed March 26, 1956

Now comes the United States of America, defendant herein, and for its amended answer to the complaint:

I

Admits the allegations of paragraphs 1, 2, 3, 4 and 11 of the complaint, except denies that jurisdiction rests on the Fifth Amendment of the Constitution of the United States or on Sections 7 and 8 of the Administrative Procedure Act.

II

Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 5 of the complaint, except admits that plaintiff applied to the Interstate Commerce Commission (hereinafter called "the Commission") for authority to purchase the operating rights and property of Joseph D. Cooper and that such application was assigned No. MC-F-578 and that the Commission approved such purchase in a report now found in 15 M.C.C. 317; and except admits that the Commission subsequently executed an order authorizing the issuance to plaintiff of a certificate of public convenience and necessity covering the operating authority involved in approval of the aforesaid purchase and thereafter granted plaintiff such certificate and that neither the order nor certificate contained any restriction as to the type of motor common carrier service.

[fol. 50]

III

Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 6 of the complaint, except admits that plaintiff applied to the Commission for authority to purchase the operating rights and property of John Hamm and that such application was assigned No. MC-F-618 and that the Commission approved such purchase in a report now found in 15 M.C.C. 320; and except admits that the Commission subsequently executed an order authorizing the issuance to plaintiff of a certificate of public convenience and necessity covering the operating authority involved in approval of the aforesaid purchase and thereafter granted plaintiff such certificate and that neither the order nor certificate contained any restriction as to the type of motor common carrier service.

IV

Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 7 of the complaint, except admits that plaintiff applied to the Commission for authority to purchase the

operating rights and property of J. A. Rose and that such application was assigned No. MC-F-619 and that the Commission approved such purchase in a report now found in 15 M.C.C. 323; and except admits that the Commission subsequently executed an order authorizing the issuance to plaintiff of a certificate of public convenience and necessity covering the operating authority involved in approval of the aforesaid purchase and thereafter granted plaintiff such certificate and that neither the order nor certificate contained any restriction as to the type of motor common carrier service.

V

Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 8 of the complaint, except admits that plaintiff applied to the Commission for authority to purchase the operating rights and property of Joseph W. Parker and [fol. 51] that such application was assigned No. MC-F-678 and that the Commission approved such purchase in a report now found in 25 M.C.C. 96; and except admits that the Commission subsequently executed an order authorizing the issuance to plaintiff of a certificate of public convenience and necessity covering the operating authority involved in approval of the aforesaid purchase and thereafter granted plaintiff such certificate and that neither the order nor certificate contained any restriction as to the type of motor common carrier service.

VI

Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 9 of the complaint, except admits that plaintiff applied to the Commission for authority to purchase the operating rights and property of Louis Tolson and that such application was assigned No. MC-F-679 and that the Commission approved such purchase in a report now found in 25 M.C.C. 96; and except admits that the Commission subsequently executed an order authorizing the issuance to plaintiff of a certificate of public convenience and necessity

covering the operating authority involved in approval of the aforesaid purchase and thereafter granted plaintiff such certificate and that neither the order nor certificate contained any restriction as to the type of motor common carrier service.

VII

Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 10 of the complaint, except admits that the Commission approved plaintiff's application to purchase a portion of the operating rights certificated to one T. M. Bennett and thereafter issued a certificate of public convenience to plaintiff covering the operating rights so purchased, which certificate indicated that the operations therein authorized were subject to such further limitations, restrictions or modifications as the Commission might thereafter find necessary to impose in order to insure that the service [fol. 52] would be auxiliary or supplementary to the train service of the St. Louis-San Francisco Railway Company (hereinafter called "the railway company") and would not unduly restrain competition.

VIII

Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraphs 12, 13, or 14 of the complaint.

IX

Admits the allegations of paragraph 15 of the complaint.

X

Denies the allegations of paragraph 16 of the complaint, except admits that the Commission issued its report and order herein, each dated December 7, 1953, and refers to that report, now found in 62 M.C.C. 367, for a proper interpretation of its findings and conclusions.

XI

Denies the allegations of paragraphs 17, 19 and 20 of the complaint.

XII

Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 18 of the complaint.

FOR A FIRST AFFIRMATIVE DEFENSE

XIII

Avers that the authority granted by the Commission's approval of plaintiff's purchase of the operating rights of Joseph D. Cooper, as alleged in paragraph 5 of the complaint herein, was made specifically subject to such further limitations or restrictions as the Commission might later find necessary to impose in order to insure that the service performed under such authority would be auxiliary or supplementary to the train service of the railway company, and would not unduly restrain competition. And further avers that the reservation of a right to impose such limitations or restrictions was inadvertently omitted from the Com- [fol. 53] mission's order authorizing issuance of a certificate of public convenience and necessity covering the operating authority involved in the aforesaid purchase, and from the certificate subsequently granted.

FOR A SECOND AFFIRMATIVE DEFENSE

XIV

Avers that the authority granted by the Commission's approval of plaintiff's purchase of the operating rights of John Hamm, as alleged in paragraph 6 of the complaint herein, was made specifically subject to such further limitations or restrictions as the Commission might later find necessary to impose in order to insure that the service performed under such authority would be auxiliary or supplementary to the train service of the railway company, and would not unduly restrain competition. And further avers that the reservation of a right to impose such limitations or restrictions was inadvertently omitted from the Commission's order authorizing issuance of a certificate of public convenience and necessity covering the operating authority involved in the aforesaid purchase, and from the certificate subsequently granted.

FOR A THIRD AFFIRMATIVE DEFENSE

XV

Avers that the authority granted by the Commission's approval of plaintiff's purchase of the operating rights of J. A. Rose, as alleged in paragraph 7 of the complaint herein, was made specifically subject to such further limitations or restrictions as the Commission might later find necessary to impose in order to insure that the service performed under such authority would be auxiliary or supplementary to the train service of the railway company, and would not unduly restrain competition. And further avers that the reservation of a right to impose such limitations or restrictions was inadvertently omitted from the [fol. 54] Commission's order authorizing issuance of a certificate of public convenience and necessity covering the operating authority involved in the aforesaid purchase, and from the certificate subsequently granted.

FOR A FOURTH AFFIRMATIVE DEFENSE

XVI

Avers that the authority granted by the Commission's approval of plaintiff's purchase of the operating rights of Joseph W. Parker, as alleged in paragraph 8 of the complaint herein, was made specifically subject to such further limitations or restrictions as the Commission might later find necessary to impose in order to insure that the service performed under such authority would be auxiliary or supplementary to the train service of the railway company, and would not unduly restrain competition. And further avers that the reservation of a right to impose such limitations or restrictions was inadvertently omitted from the Commission's order authorizing issuance of a certificate of public convenience and necessity covering the operating authority involved in the aforesaid purchase, and from the certificate subsequently granted.

FOR A FIFTH AFFIRMATIVE DEFENSE

XVII

Avers that the authority granted by the Commission's approval of plaintiff's purchase of the operating rights of

Louis Tolson, as alleged in paragraph 9 of the complaint herein, was made specifically subject to such further limitations or restrictions as the Commission might later find necessary to impose in order to insure that the service performed under such authority would be auxiliary or supplementary to the train service of the railway company, and would not unduly restrain competition. And further avers that the reservation of a right to impose such limitations or restrictions was inadvertently omitted from the [fol. 55] Commission's order authorizing issuance of a certificate of public convenience and necessity covering the operating authority involved in the aforesaid purchase, and from the certificate subsequently granted.

FOR A SIXTH AFFIRMATIVE DEFENSE

XVIII

Avers that the consolidated certificates, referred to in paragraph 11 of the complaint, to the extent that they covered operating rights within the scope of the prior certificates described in the complaint, represented operating authorities which the Commission had approved for purchase by plaintiff on the specific condition that these operating authorities were subject to such further limitations or restrictions as the Commission might later find necessary to impose in order to insure that the service performed as a result of them would be auxiliary or supplementary to the train service of the railway company, and would not unduly restrain competition. And further avers that a reservation of a right to impose such limitations or restrictions was inadvertently omitted from these consolidated certificates.

XIX

For further answer, the United States denies that the actions of the Commission challenged herein are unlawful for the reasons specified in the complaint or for any reasons whatsoever. The United States avers that, in issuing the report and orders review of which is sought in this proceeding, the Commission carefully considered the National Transportation Policy and, in the light of its knowledge and experience, all of the facts and circumstances called to its

attention by the respective parties; and that said report and orders were not made or entered arbitrarily, unjustly or contrary to law.

XX

Except as it denies knowledge or information as to the truth of certain allegations, expressly admits certain al-
[fol. 56] legations or otherwise pleads affirmatively, the United States denies each and every allegation contained in the complaint.

Wherefore, having fully answered, this defendant prays that the relief sought herein by the plaintiff be denied, that its complaint be dismissed and that this defendant be granted such other and further relief as to the Court may seem meet and just.

James E. Kilday, Maurice A. Fitzgerald, Attorneys, Department of Justice.

Stanley N. Barnes, Assistant Attorney General, Harry Richards, United States Attorney.
Attorneys for the United States of America

Certificate of service (omitted in printing).

[fol. 57] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN JUDICIAL DISTRICT OF MISSOURI, EASTERN DIVISION

[Title omitted]

ANSWER OF BE-MAC TRANSPORT CO., INC., ET AL.—
Filed March 28, 1956

Comes now Be-Mac Transport Co., Inc., Viking Freight Company, C. E. S. Truck Lines, Inc., and L. A. Tucker Truck Lines, Inc., Intervenors herein, and for answer admit that plaintiff is a corporation, as alleged in Paragraph 1 of the Complaint.

2. Intervenors admit the jurisdiction of this Court, as alleged in Plaintiff's Complaint.

3. Intervenors admit that plaintiff is a motor common carrier, but state that they have neither sufficient information nor knowledge from which to form a belief as to the extent of the present and past operations of plaintiff in interstate and intrastate commerce, for which reason Intervenors deny the allegations of Paragraph 4 of plaintiff's complaint relative to its past and present motor carrier activities.

Intervenors admit that plaintiff is a wholly owned subsidiary of St. Louis-San Francisco Railway Company, a common carrier by rail, subject to Part I of the Interstate Commerce Act.

4. Intervenors admit the allegations of Paragraphs 5 through 10 inclusive of plaintiff's Complaint.

Further answering the allegations of Paragraphs 5 through 9 inclusive, Intervenors state that in each instance, to-wit in MC-F-578, 15 M.C.C. 317; MC-F-618, 15 M.C.C. 320; MC-F-619, 15 M.C.C. 323; MC-F-678, 25 M.C.C. 96; MC-F-679, 25 M.C.C. 96, the order of the Commission approving the transfer of the operating authorities involved to the plaintiff herein was conditioned as follows:

> [fol. 58] "the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find necessary to impose in order to insure that the service shall be auxiliary or supplemental to the train service of the said railway company, and shall not unduly restrain competition." (15 M.C.C. l.c. 319, 322, 325, 25 M.C.C. 100).

Answering Paragraph 10, Intervenors admit that there was physically incorporated into the certificate issued to plaintiff under Docket No. MC 89913 Sub 10 the language set out in Paragraph 10(e) of plaintiff's Complaint.

5. Intervenors admit the allegations of Paragraph 11 of plaintiff's Complaint.

6. With respect to the matters and things alleged in Paragraph 12 of plaintiff's Complaint, Intervenors state that plaintiff's predecessors were common carriers by motor vehicle unaffiliated in any manner with a railroad company and subject only to the then Motor Carrier Act of 1935,

now Part II of the Interstate Commerce Act of 1940, as a result of which fact there was no basis for any restriction upon the service performed or to be performed by plaintiff's predecessors (vendors).

Further answering Paragraph 12 of plaintiff's Complaint, intervenors state that orders entered by the Interstate Commerce Commission pursuant to applications made to said Commission under Section 5(2) of the Interstate Commerce Act (49 U.S.C.A. Section 5(2)) are permissive in nature only and do not require an applicant vendee or vendor to consummate such transactions, particularly where the terms of approval are such as to indicate some restriction upon the operating rights to be transferred.

Further answering said Paragraph 12, Intervenors state that in each instance alleged in plaintiff's Complaint in Paragraphs 5 through 10 inclusive, plaintiff had full knowledge of the fact that the Commission by order subjected the operations authorized to such further limitations, restrictions or modifications "as the Commission may hereafter find it necessary to impose, in order to insure that the service shall be auxiliary or supplemental to the train service of the St. Louis-San Francisco Railway Company [fol. 59] and shall not unduly restrain competition."

7. As to the allegations of Paragraph 13, Intervenors state that the jurisdiction of the Interstate Commerce Commission, together with such rules, regulations, and orders as it may issue or prescribe from time to time, are not subject to nor may they be influenced by expressed or other intentions of applicant, but must reflect expert judgment based upon facts of record. Intervenors further state that the function of the Interstate Commerce Commission is to regulate interstate transportation and the agencies thereof in a manner in conformity with the National Transportation Policy as declared by Congress and not in any manner in conformity with the wishes, desires or intentions of parties appearing before the said Commission.

Further answering Paragraph 13 of plaintiff's Complaint, Intervenors deny that the plaintiff herein informed the Commission of any intent on its part to operate the rights subject of purchase as a complete motor common carrier service for the public, but rather represented that its intentions were at all times to render a service supplementary,

auxiliary to and in substitution of rail service and upon rail billing.

Further answering the allegations of Paragraph 13 of plaintiff's Complaint, Intervenors state that Section 5(2)(b) of the Interstate Commerce Act (49 U.S.C.A. Section 5(2)(b)) provides, among other things, as follows:

> "*Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

8. As to the matter alleged in Paragraph 14 of plaintiff's Complaint, Intervenors state that the Commission, entrusted as it is with the duty of regulating the entire national transportation industry, may not be estopped nor may the Commission, to the detriment of other transporta- [fol. 60] tion agencies and media engaged in interstate commerce, be influenced in its decisions and orders by the actions of the plaintiff herein.

Further answering the allegations of Paragraph 14 of plaintiff's Complaint, Intervenors state that the plaintiff herein made the investments alleged and employed and retained the personnel as set out in said Paragraph 14 with full knowledge of the restriction contained in the orders entered by the Interstate Commerce Commission in the various proceedings alleged and set out in Paragraphs 5 through 10 inclusive of plaintiff's Complaint.

9. Intervenors admit the allegations of Paragraphs 15, 15(a), (b) and (c).

10. Intervenors admit the allegations of Paragraph 16 of plaintiff's Complaint insofar as the actions and orders of the Commission are reflected therein, but nevertheless deny those allegations of Paragraph 16 which state that the action of the Commission complained of would result

in diminishing the motor carrier operating rights held by plaintiff and in reducing such operating rights as alleged.

Further answering said Paragraph 16, Intervenors state that the Commission by reason of the terms and provisions of Section 5(2)(b) of the Interstate Commerce Act, supra, was required by law to so limit and restrict the operating rights and authorities of plaintiff herein so as to not unduly restrain competition.

Further answering said Paragraph 16, Intervenors state that the report and order of the Commission complained of, and the new or amended certificates to be issued accurately reflect and define the true function of a wholly owned subsidiary motor common carrier operation of a common carrier by railroad so that such new or amended operating authority conforms fully with similar authority held by other railroad companies. (See 15 M.C.C. 318)

11. Intervenors deny each and every allegation of Paragraph 17, 17(a) through (m).

[fol. 61] Further answering said Paragraph 17 and its sub-paragraphs (a) through (m), Intervenors state that the continuation of unlimited and unrestricted motor common carrier operating authority in the plaintiff would unduly restrict and restrain commerce and competition in commerce to the detriment of motor carriers operating in competition with the St. Louis-San Francisco Railway Company and the plaintiff herein, would be contrary to the National Transportation Policy as defined and declared by Congress and to the express provisions of Section 5(2)(b) of the Interstate Commerce Act with resultant detriment to the shipping public and undue restraint of competition.

12. Intervenors deny the allegations of Paragraph 18 and further state that the theory of estoppel cannot be applied to the actions of the Federal Government or any of its agencies.

Intervenors further state with respect to the allegations of Paragraph 18 that the matters and things complained of in Paragraph 18 of plaintiff's Complaint relative to the investment of plaintiff and service to the shipping public and other matters and things as alleged are properly matters for administrative discretion and determination, by the Interstate Commerce Commission and that said Com-

mission has determined all of said matters in accordance with law and the evidence of record before the Commission, and after having afforded to the plaintiff a full and complete hearing after notice in accordance with law.

Wherefore, Intervenors pray that this Honorable Court dissolve the temporary restraining order heretofore issued and deny plaintiff the further relief prayed for in plaintiff's Complaint.

Further, Intervenors pray that this Court enter its order dismissing this Complaint in the proceedings herein.

La Tourette & Rebman, s/ B. W. La Tourette, 314 North Broadway, St. Louis 2, Missouri, GA 1-6010, Attorney for above intervenors.

[fol. 62] Certificate of service (omitted in printing).

[fol. 63] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

[Title omitted]

AMENDED ANSWER OF INTERVENOR INTERSTATE COMMERCE COMMISSION—Filed April 2, 1956

Comes now the Interstate Commerce Commission, intervenor herein, hereinafter referred to as the Commission, and pursuant to the order of the Court dated March 14, 1956, files this amended answer to the complaint, and says:

I.

Admits the allegations contained in paragraphs 1 through 12, both inclusive, of the complaint.

II.

Admits the allegations contained in the first sentence of paragraph 13 of the complaint and denies the allegations contained in the second sentence thereof.

III.

Admits the allegations contained in paragraphs 14 and 15 of the complaint.

[fol. 64]

IV.

Denies the allegations of paragraph 16 of the complaint, except those pertaining to the issuance of the reports and orders of the Commission and respectfully refers the Court to that report now printed at 62 M.C.C. 367, for a proper interpretation of the findings and conclusions contained therein.

V.

Denies each and every allegation contained in paragraph 17 of the complaint.

VI.

Answering paragraph 18 of the complaint, the Commission says that the allegations contained therein are irrelevant, immaterial, not based upon evidence of record, argumentative in nature and require no answer. To the extent that answer may be required, the Commission states that it is without knowledge or information sufficient to form a belief as to the truth of those allegations.

VII.

Denies the allegations of paragraphs 19 and 20 of the complaint.

Wherefore, having fully answered, this defendant prays that the relief sought by plaintiff be denied, that the temporary restraining order heretofore issued be vacated, that the complaint be dismissed, and that plaintiff pay the costs.

Interstate Commerce Commission, By s/ Robert W. Ginnane, General Counsel, s/ C. H. Johns, Assistant General Counsel.

[fol. 65] Certificate of service (omitted in printing).

[fol. 66] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN JUDICIAL DISTRICT OF MISSOURI, EASTERN DIVISION

FRISCO TRANSPORTATION COMPANY, A Corporation, Plaintiff

v.

UNITED STATES OF AMERICA, Defendant

Civil Action No. 10272(1)

AMENDED ORDER CONVENING THREE-JUDGE COURT—
July 11, 1956

The above named plaintiff having filed suit which is now pending in the above entitled court, seeking temporary and permanent injunction, enjoining, suspending, annulling and setting aside certain orders of the Interstate Commerce Commission, and said application for injunction having been presented to the Honorable George H. Moore, United States District Judge for the Eastern District of Missouri, and said Judge having notified the Chief Judge of the United States Court of Appeals for the Eighth Circuit, thereof;

It Is Now Here Ordered that Honorable Martin D. Van Oosterhout, United States Circuit Judge, and Honorable Roy W. Harper, United States District Judge for the Eastern District of Missouri, be and they hereby are designated and assigned to sit with the above named Honorable George H. Moore, United States District Judge for the Eastern District of Missouri, to hear and determine said action and proceeding.

This Amended Order is made and entered because of the death of Honorable Rubey M. Hulen, United States District [fol. 67] Judge for the Eastern District of Missouri, heretofore designated to sit as one of the Judges in said action.

Dated this 11th day of July, A. D. 1956.

s/ Archibald K. Gardner, Chief Judge of the United States Court of Appeals, for the Eighth Circuit.

[fol. 68] UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARCHIBALD K. GARDNER
Chief Judge

Huron, S. Dak.
July 11, 1956

Mr. James J. O'Connor
Clerk, U. S. District Court
St. Louis, Missouri

Dear Mr. O'Connor:

The tragic death of Judge Hulen has made it necessary to amend the order organizing three-judge court in the case of Frisco Transportation Company vs. United States of America, Civil Action No. 10272(1), pending in Judge Moore's court.

I am enclosing such amended order to you herewith, naming Judge Martin D. Van Oosterhout, United States Circuit Judge, and Judge Roy W. Harper to sit with Judge Moore in this matter. Will you kindly file this amended order in your office, and oblige.

Sincerely yours,

ARCHIBALD K. GARDNER

Enc.

[fol. 69] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN JUDICIAL DISTRICT OF MISSOURI, EASTERN DIVISION

[Title omitted]

STIPULATION RE: HEARING AND RECORD—Filed September 19, 1956

The parties to the above-entitled cause, pursuant to a conference held with The Honorable Roy W. Harper, United States District Judge, agree as follows:

1. That a hearing before the statutory three-judge court, as reconstituted by order dated July 11, 1956 (filed July 13, 1956), may be held on September 19, 1956, without further notice to any party.

2. That the record of the proceedings before the three-judge court on June 19, 1956, consisting of the introduction of evidence and arguments by counsel, shall be introduced at the hearing on September 19, 1956, and shall constitute the record of the proceedings before the three-judge court as reconstituted.

3. That each of the parties waive the right to further argue the case before the statutory three-judge court as reconstituted and rely upon the arguments made on June 19, 1956, as recorded in the transcript of the proceedings on that date as their argument before the three-judge court as reconstituted.

[fol. 70] 4. That the briefs previously filed by the parties hereto shall constitute their briefs before the three-judge court as reconstituted.

s/ Wayne H. Bigler, Jr., Attorney for United States of America and Interstate Commerce Commission.

s/ La Tourette & Rebman, By s/ B. W. La Tourette, Attorney for American Trucking Associations, Inc. and Regular Common Carrier Conference of American Trucking Associations.

s/ Reeder, Gisler, Griffin & Deport, By s/ Milford T. English, Attorney for Campbell "Sixty-Six" Express, Inc.

s/ Ernest D. Grinnell, Jr., Attorney for Plaintiff.

s/ La Tourette & Rebman, By s/ B. W. La Tourette, Attorney for Viking Freight Company, Be-Mac Transport Co., Inc., C. E. S. Truck Lines, Inc., L. A. Tucker Truck Lines, Inc., and Consolidated Forwarding Co., Inc.

s/ Carroll J. Donohue, Attorney for Railway Labor Executives' Association.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF MISSOURI,

EASTERN DIVISION.

FRISCO TRANSPORTATION COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

No. 10,272.
Court 1.

St. Louis, Missouri,
June 19, 1956.

TRANSCRIPT OF PROCEEDINGS.

Before:

Honorable Martin D. Van Oosterhout, United States Circuit Judge;

Honorable George H. Moore, United States District Judge;

Honorable Rubey M. Hulen, United States District Judge.

Appearances:

John E. McCullough, Esq., Ernest D. Grinnell, Jr., Esq., A. J. Baumann, Esq., appeared on behalf of the plaintiff, Frisco Transportation Company, a corporation.

Wayne H. Bigler, Esq., Assistant United States Attorney, and Maurice A. Fitzgerald, Esq., Attorney, Department of Justice, Washington, D. C., appeared on behalf of the United States of America, defendant.

C. H. Johns, Esq., Assistant General Counsel, Interstate Commerce Commission, Washington, D. C., and Wayne H. Bigler, Esq., Assistant United States Attorney, Eastern District of Missouri, Eastern Division, appeared on behalf of the Interstate Commerce Commission, defendant.

B. W. LaTourette, Esq., St. Louis, Missouri, appeared on behalf of Viking Freight Company, Be-Mac Transportation Company, C. E. S. Truck Lines and L. A. Tucker Truck Lines, intervenors.

Peter T. Beardsley, Esq., Washington, D. C., appeared on behalf of American Trucking Association, Inc., and its Regular Common Carrier Conference, intervenors.

Carroll J. Donohue, Esq., St. Louis, Missouri, and James L. Highsaw, Esq., Washington, D. C., appeared on behalf of Railway Labor Executives Association, intervenors.

Wentworth E. Griffin, Kansas City, Missouri, appeared on behalf of Campbell "66" Express, intervenor.

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Judge Van Oosterhout: This is the time that has been fixed for the hearing on the merits of Case No. 10272, Frisco Transportation Company, a corporation, against United States of America et al. Are the parties all here and ready to proceed?

Mr. McCullough: The plaintiff is ready, Your Honor.

Mr. Bigler: The defendant, United States and Interstate Commerce Commission are here, Your Honor.

I would like at this time, if I may, to introduce to the Court Mr. Maurice Fitzgerald, a member of the bar of the District of Columbia and who has been admitted to practice before the Supreme Court of the United States, who will represent the United States at the hearing.

I would like also to introduce to the Court, if I may, Mr. Charles Johns, of the District of Columbia bar, who has been admitted to practice before the Supreme Court and who will represent the Interstate Commerce Commission at the hearing.

Mr. LaTourette: If Your Honors please, the Intervenor truck lines are also ready.

Mr. Donohue: If the Court please, the intervenor, Railway Labor Executives Association is ready. At this juncture, if I may, I would like to introduce to the Court Mr. Wentworth Griffin of Kansas City, a member of the State and Federal bar there, and ask leave of this court that Mr. Griffin be permitted to participate in these proceedings on behalf of his client, the Campbell "66" Express, an intervenor here.

Judge Moore: I think it would be well for all of you to give your name.

Judge Van Oosterhout: I think possibly it might be best to start with attorneys for the plaintiff, for the purpose of the record.

Mr. McCullough: John E. McCullough is my name, 300 Frisco Building, St. Louis. I have associated with me Mr. Ernest D. Grinnell, Jr., and Mr. Al Baumann.

Mr. Fitzgerald: I am Maurice A. Fitzgerald, Washing-

ton, D. C., Department of Justice, representing the defendant, United States of America.

Mr. Johns: C. H. Johns, Washington, D. C., representing the Interstate Commerce Commission.

Mr. Bigler: Wayne H. Bigler, Assistant United States Attorney from the Eastern District of Missouri, for the United States and Interstate Commerce Commission.

Mr. LaTourette: B. W. LaTourette, St. Louis, Missouri, appearing for Viking Freight Company and BeMac Transportation Company, C. E. S. Truck Lines and L. A. Tucker Truck Lines, Intervenors.

Mr. Beardsley: Peter T. Beardsley of Washington, D. C., appearing for American Trucking Associations and Regular Common Carrier Conference of American Trucking Associations, intervening defendants, and we are prepared to go forward with argument today.

Mr. Donohue: I am Carroll J. Donohue. I am appearing with Mr. James L. Highsaw, Jr., of Washington, on behalf of the Railway Labor Excutives Association, intervenors.

Mr. Griffin: I am Wentworth E. Griffin of Kansas City, Missouri, appearing in behalf of Campbell "66" Express, an intervenor. We are ready to proceed.

Mr. Beardsley: At this time, if it is in order, we would like to bring up and notice our request to the court to limit the hearing today.

Mr. McCullough: Before we start, I wonder if we might inquire if Consolidated Forwarding Company have dropped out of this suit because I notice an appearance has not been made for them.

Judge Van Oosterhout: One of the intervenors?

Mr. McCullough: Yes.

Judge Van Oosterhout: Is anyone representing the Consolidated Freight Company? Apparently no one here present.

Mr. Grinnell: There was no answer filed by that party either, Your Honor, that is one reason we inquired.

Judge Van Oosterhout: I assume that they had notice of this hearing.

Mr. Grinnell: They were represented at the previous hearing and were listed as an intervenor in the order.

Judge Moore: Who represented them, Mr. Grinnell?

Mr. Grinnell: I think Mr. LaTourette's associate, Mr. Rebman announced at the hearing.

Mr. LaTourette: I do not recall, Your Honor, that that was the case. However, if they have not filed an answer it was because we were not asked to proceed further for them in this matter.

Judge Van Oosterhout: Very well.

Mr. Beardsley: At this time we would like permission to file the request to limit hearing in this case with the court. Under date of the 8th of June we gave notice to the plaintiff and all the other parties to the proceeding that at the outset of the hearing today we would file this request to limit hearing. Of course, copies have been mailed the court.

Judge Van Oosterhout: I think each of us have received and read your instrument that you are now referring to and leave will be granted to file the instrument.

Mr. Beardsley: Does the Court wish to hear any argument at this time?

Judge Van Oosterhout: The Court is of the opinion that it may be somewhat premature at this time, that we should not go into the matter until the situation arises where we get into it, and any argument in consideration of the motion will be deferred until the situation at which the motion is directed arises, and at that time, when and if that time arises, counsel will be heard.

Mr. Beardsley: Yes, sir.

Mr. McCullough: If the Court please, we would like to file our reply at this time to the request that has just been referred to.

Judge Van Oosterhout: Very well.

Mr. McCullough: That has also been distributed to the court and to the parties.

We also think it would be orderly procedure here if we were permitted to make a short opening statement.

Judge Van Oosterhout: That will be perfectly satisfactory. The Court will be glad to hear from counsel, Mr. McCullough.

Mr. McCullough: At the beginning of this hearing plaintiff would like to make a brief statement concerning suggested procedure to be followed. Last week the intervening defendants served us with Request to Limit Hearing in which they requested that this hearing be limited to the introduction of a verified record of the proceedings before the Commission and an oral argument on the validity of the Commission's orders based on such record. We attempted to file a reply to that request but the clerk did not receive it since the request itself was not on file. Our reply was distributed to the court last night and opposing parties living in St. Louis. Others were given copies of it this morning. In our reply we indicated that as far as the plaintiff was concerned, this case should be submitted on brief without oral argument.

The basic reason for the filing of the Request to Limit Hearing was the fact that these intervenors had predicted, and, I might add correctly, that plaintiff would seek to offer evidence at this hearing in addition to the verified record before the Commission. Our reply fully presents the reasons why we think we are entitled to offer such evidence. Our offer, when made, will be based upon the decision of the District Court in Delaware, sitting as a three-judge court, in Seatrain Lines Against United States which case is reported in 64 Fed. Supp., at page 156. In that case the court allowed the plaintiff to introduce evidence showing the effect of an order of the Interstate Commerce Commission which had cancelled plaintiff's original certificate and ordered that a new certificate containing certain restrictions be issued in lieu thereof. Sea-

Train Lines, the plaintiff in this case, did not take advantage of an opportunity to introduce evidence before the Commission showing the effect of the order and the court held that despite the fact that plaintiff had the opportunity to introduce evidence before the Commission and did not, it would receive evidence showing effect of the order. We think that the Seatrain case is ample authority for the introduction of evidence showing the effect of the order in this case. The Supreme Court affirmed the Seatrain case, but did not pass upon the correctness of the evidence rule.

I might add that the evidence which we propose to introduce is very limited. It consists of a prepared statement by the vice president and general manager of the plaintiff and is confined to a brief description of the plaintiff, and a brief statement showing the effect of the order which is here under attack upon the plaintiff and its business.

Judge Van Oosterhout: I think, Mr. McCullough, it is the thought of the court that probably in our discussion we could rule on that request more intelligently at the time it is offered rather than to determine in advance, not knowing what it was, as to whether we should admit it or exclude it.

Mr. McCullough: I think that is correct, Your Honor.

Judge Van Oosterhout: We felt probably the best way to proceed, and that was why we denied the intervenors the opportunity to argue on this proposition, was to wait until the offer of the evidence first as to which there is no controversy, and when you get to this evidence we will hear whatever anyone wants to say with reference to that particular evidence.

Mr. McCullough: Do you prefer then as I understand it that I pass that at this time?

Judge Van Oosterhout: Pass that until the time arises when you try to offer that evidence. Then you can make any explanation you care to make.

Mr. McCullough: Very well. We will be glad to do that and be governed by that.

Now, in addition to this evidence we just passed, we propose to offer a certified record of the proceedings before the Commission. I would like to have it identified as Exhibit 1. It is a little beat up here because the printer in printing it—I am sure it is all here.

Judge Van Oosterhout: It may be marked.

Mr. McCullough: It is bound and over the official seal as being an exact copy.

Judge Van Oosterhout: Do any of the other parties have any objection to that method of identification?

Mr. Johns: No objection, Your Honor. We would like for counsel to be a little more specific and state what he is certifying, not just say the whole record.

Judge Van Oosterhout: I think you are now making your opening statement, and after you have completed your opening statement, it might be more appropriate to wait until we reach the stage where you offer the evidence.

Mr. McCullough: That is what I initially intended to do.

Judge Van Oosterhout: You can leave that with the Reporter.

Mr. McCullough: Although we are about at that point.

Judge Van Oosterhout: Probably you might tell us briefly as to what the issue is and the basis on which you contend that you are entitled to plead without going into any argument.

Mr. McCullough: I think the basic issue in this proceeding will be determined on five questions: first, does the Commission have the power to cancel plaintiff's certificates on the grounds of inadvertence; second, does the Commission have the power to cancel certificates in furtherance of a Commission policy conceived long after the certificates were issued; third, was there any evidence to support the Commission's finding that the certificates

were inadvertently issued; fourth, was there in fact any inadvertence; fifth, was plaintiff accorded due process in proceedings before the Commission.

Now, there may be some minor related questions but I think those five are the principal questions that this court will be asked to determine.

We propose to introduce these orders.

Judge Van Oosterhout: I do not think the court has any particular notion as to when it will properly come up but it seems it might come up more properly when you make a specific offer so that we know just what you are trying to introduce rather than to rule on the matter generally.

Mr. McCullough: Well, I think as a procedural matter there is one additional thing that perhaps should be mentioned at the outset of this hearing and that, as the Court knows, the primary defendants, that is the United States and Interstate Commerce Commission have filed answers which are not exactly the same. In addition, the defendants have filed a total of four separate answers.

Judge Van Oosterhout: You mean the intervenors?

Mr. McCullough: The intervenors, yes, sir. Of those six answers the most liberal from the standpoint of admission is that of the Interstate Commerce Commission which admits all the basic facts and allegations contained in the complaint. We are somewhat at a loss to know exactly what to do under these circumstances. It would seem to us that since the Commission is obviously the defendant, possessing the most extensive knowledge of the facts of this case, in order to simplify the issues to the greatest extent possible it would be appropriate for all defendants to announce that they adopt the answer of the Interstate Commerce Commission as to the factual allegations of our complaint and amend their answer accordingly. In the case where certain defendants did not have knowledge of certain facts, and so stated in their answer, it seems to us we should have some sort of agree-

ment. In view of the Interstate Commerce Commission admission of these facts plaintiff should not be required to prove such facts. If the intervening defendants have any suggestion in this connection we would be glad to hear it.

Judge Van Oosterhout: I would suggest counsel in making their opening statement might respond to the inquiry that you just made.

Mr. McCullough: Well, in order to give the other parties an opportunity to be heard here before we go into the introduction of evidence, I will relinquish my post here, but I merely want to say this, that we are strongly of the opinion that oral argument should not be held in this case, that the proceeding is more amenable to the filing of briefs. We think that in view of the extensive proceedings before the Commission over a long period of years, that we would save time for all concerned if oral arguments were waived and the matter submitted on brief in a short time. We have been working on our brief and we are ready to submit it within a very short time, I would say a matter of fifteen days, assuming that there are no complications arising here that we do not know about now.

Judge Van Oosterhout: Does counsel for the United States desire to make any opening statement?

Mr. Fitzgerald: Before I do, Your Honor, would you give me a moment to consult with my associates?

Judge Van Oosterhout: Surely.

Mr. Fitzgerald: Thank you.

Mr. Johns: I am C. H. Johns of the Interstate Commerce Commission. We have come here prepared to make an oral argument. We do not insist on it too strongly, we will more or less leave that up to the wishes of the court.

Judge Van Oosterhout: You can make a brief statement. It seems to me—I do not know how the other judges feel, we can determine that better after the record

is in. Undoubtedly the court will permit supplemental written argument but in my experience it often helps clarify the issues and eliminate some false issues to have somewhat of an oral argument with the right reserved to file written briefs, but I think we will confer and defer any decision on that question until we got the record in, until the point of argument is reached. But if you desire to state your feelings on it at this time that is all right, too.

Mr. Johns: I agree with Your Honor's statement. I think oral argument does have a tendency to narrow the issue. Mr. McCullough thinks there are five issues. We think there is one issue here, whether or not the issuance of certificates was through inadvertence. We think that is the sole issue before the court. I think oral argument will more or less clear that up.

I do have here, Your Honor, printed copies of the Commission's report which is involved in this case, a printed copy of the Division's report and a printed copy of the entire report on reconsideration, and I have enough copies here for each member of the court. I would like to leave them.

Judge Van Oosterhout: That is very fine. I do not have the Interstate Commerce Commission reports generally available at my office. I doubt whether the other judges do either. So if you are relying on any Interstate Commerce Commission decisions it will be to some advantage to have the reports accessible to us. They are rather hard to locate.

Mr. Johns: And I also have here parts of the record which in all probability have not been certified here by the plaintiff.

Judge Van Oosterhout: You will have an opportunity to introduce any evidence that you may want to introduce.

Mr. Johns: Shall I hold these then until later?

Judge Van Oosterhout: Well, it makes probably for a better record.

Mr. Johns: Then we will leave it to the court as to whether or not we have oral argument.

Judge Van Oosterhout: It will probably take a long time to check through, it is probably better to have them in twice than to see whether they are in or not.

Mr. Johns: That is quite true, yes, sir.

Judge Van Oosterhout: Very well. Do the intervenors

Mr. Fitzgerald: Your Honor, counsel for the United States concurs in the remarks which have just been made by Mr. Johns.

With respect to the remarks of Mr. McCullough as to the answer of the United States, we think the amended answer we have filed is sufficient in the circumstances. As a matter of fact, I think both the answer of the United States and the answer of the Interstate Commerce Commission are substantially similar with respect to the creation of issues for this litigation.

I haven't anything further to say at this time until the other gentlemen reply with respect to their answers.

Judge Van Oosterhout: Very well. Do the intervenors have any statement that they desire to make at this time?

Mr. LaTourette: If Your Honors please, our position will be much similar to that expressed by the Commission and the United States Government, and we propose to make a short statement later in the order of procedure to show the general effect of a reversal of the Commission's order on the independent motor carriers.

Judge Van Oosterhout: It is not necessary that all counsel make statements but you are privileged to do so if you have anything you desire to state.

Mr. Highsaw: Your Honor, on behalf of the Railway Labor Executives Association, Intervenor, we have nothing to add to what has been said by the United States and the Interstate Commerce Commission, our statement is the same.

Mr. Beardsley: For the American Trucking Associations

we have nothing to add, we adopt the statement of the Government and the ICC.

Judge Van Oosterhout: Well, now, I presume that we are ready for the introduction of evidence.

The Plaintiff may proceed.

Mr. McCullough: In order to comply with Mr. Johns' request, I would like to offer in evidence at this time a certified record of the proceedings before the Commission which contains the order of the Commission entered January 4, 1945; the report on reconsideration proposed by Examiner David Waters served February 8, 1945; the order of the Commission entered May 28, 1945; the order of the Commission entered March 8, 1946; transcript of stenographer's notes of hearing held April 8, and April 9, 1946, at Kansas City, Missouri; and Exhibits 1-A to 16-A, both inclusive, filed at said hearing; report and order on further hearing recommended by William T. Croft and Beverley S. Simms, Examiners, served April 8, 1948; report and order of the Commission on further hearing filed and entered October 22, 1951; order of the Commission entered November 26, 1951; order of the Commission entered July 7, 1952; and order of the Commission entered on April 4, 1955.

These are all over the seal of the Secretary of the Interstate Commerce Commission, his seal, dated August 15, 1955.

(The certified copy of the record referred to was marked Plaintiff's Exhibit No. 1.)

Mr. McCullough: I would like to introduce as Plaintiff's Exhibit No. 2 the report and order of the Commission filed and entered on December 7, 1953, in MC-89913, Sub. 1, Frisco Transportation Company-extension Joplin-Miami et al., the original of which is now on file and on record with said Commission. This is also over the seal of the Secretary of the Commission dated June 11, 1956.

(The document referred to was marked Plaintiff's Exhibit No. 2.)

Mr. Johns: If I might interrupt, that is a photostat of what I have just handed up to Your Honors, the first printed report.

Mr. McCullough: I would like to introduce as Exhibit No. 3 a transcript of the hearing at Kansas City starting on April 8th. This is a part of Exhibit 1 and is reproduced for the convenience of the court and the parties. This is found on pages 1 to 194, both inclusive, of the report in question which is reported in 62 Motor Carrier cases 367, begins at page 195 of this bound volume.

I might say, too, that has been paged according to the official page numbers of the Commission back in the report sections so that you can tell the official page numbers from the official records.

(The document referred to was marked Plaintiff's Exhibit No. 3.)

Mr. McCullough: I would like to offer as Exhibit No. 4 a simplified map of the Frisco Transportation Company. This simplifies a highly detailed map which is a part of the record before the Commission. However, I think that is much more understandable, in this simplified form, than the one that is in the record.

(The document referred to was marked Plaintiff's Exhibit No. 4.)

Judge Van Oosterhout: This is the same map produced at the last hearing?

Mr. McCullough: Yes, sir, I believe it is identical, yes, sir.

Judge Van Oosterhout: Are counsel familiar with these exhibits that have been offered? Do they desire to inspect them or make any objection to the offer thus far made?

Mr. Johns: Well, for the record, sir, we object to Exhibits 3 and 4. Exhibit 3 is simply a reproduction of the

original there, and for the Court's convenience I think it is all right but I do not think it should be an exhibit in this case. It is simply a reproduction of an exhibit in this case; and on Exhibit 4, for argument purposes we have no objection to counsel using it but we do not think it is properly an exhibit because it is contained in the Commission's record. He says it is a simplified copy of one contained in the Commission's record. We have no objection to him using it for argument purposes but not to be introduced as an exhibit.

Judge Van Oosterhout: The Court is of the opinion that the objection probably is technically good to Exhibits 3 and 4. We think the objection should be sustained, but the Court would like to have the exhibits available. I assume, Mr. McCullough, from what Mr. Johns said that this was all in the record that you previously introduced?

Mr. McCullough: That is right.

Judge Van Oosterhout: And this is just somewhat in the nature of a brief or something to help the court understand it and to get the information the court is very happy to receive it for that purpose but probably technically it would not be evidence. The best evidence would be the record before the Commission; and in view of the objection that has been made, that is the reason for the ruling on it, but we would like to have access to the papers offered. Technically they probably are not a part of the record, should not be received as part of the record in this case.

Mr. Johns: If I might further add, sir, we are trying over the years to restrict these hearings to an appellate hearing and not a trial, and that is the real purpose of our objection.

Mr. McCullough: I think the objection is well taken and the ruling, too. We did that merely for the convenience of the court so that you would have that record available, in handy form.

Judge Van Oosterhout: It doubtless will facilitate the work of the court although not technically an exhibit.

Mr. McCullough: At this time we would like to call Mr. Bryant as a witness.

I might add, too, that we have departed from the usual procedure, I believe, in courts to place Mr. Bryant's testimony in written form. It is extremely short. It contains about eight pages double spaced. This testimony was distributed to all the parties prior to the trial this morning. We feel that in view of the technical nature of this that it would be in order to have him read it rather than the usual method of submitting to questions and answers.

Judge Van Oosterhout: Mr. Bryant may step forward and be sworn by the Clerk.

R. C. BRYANT,

was called as a witness, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Mr. Beardsley: If the Court please, if it is in order now we would like to object to the testimony of Mr. Bryant for the reasons—and if the Court would like to hear argument I am prepared to go forward with that for a few minutes.

Judge Van Oosterhout: Possibly we should first ask Mr. McCullough, either by formal question or otherwise, there should be some development as to what type of testimony and on what issue we are going to proceed for the purpose of calling the witness, and then we will hear from you. Is that satisfactory?

Mr. Beardsley: Yes, sir.

Mr. McCullough: Plaintiff offers this testimony in this case, which will be limited to a brief description of the plaintiff and to a brief statement showing the effect of the Commission's order and also to support our request for a permanent injunction in this proceeding. I believe that is the nub of his testimony.

Judge Van Oosterhout: Counsel is saying the proposed testimony. I have not seen it.

Mr. McCullough: I am sorry.

(Mr. McCullough hands copy of proposed testimony to the Court.)

Judge Van Oosterhout: I think possibly under the decisions a question of some pertinence may be as to whether there was an opportunity to offer this testimony before the Commission. Do you have any showing that you desire to make in that respect?

Mr. McCullough: Yes, we base our offer on the Federal Court, three-judge federal court decision in the Seatrain case.

Judge Van Oosterhout: I presume probably, to be sure that we have the record straightened out, you might say objections were made and sustained to Exhibits 3 and 4; no objections were made to Exhibits 1 and 2, and I assume no one attempted to object to Exhibits 1 and 2. If that is the situation, which it appears to be, why the exhibits will be received, Exhibits 1 and 2. That was preliminary to this statement that we haven't had an opportunity to read the record before the Commission, and I suppose that that would disclose as to whether there had been a hearing and whether there had been an opportunity to introduce this evidence that you are seeking to introduce now before the Commission, and that I think is the thing that the court is probably interested in hearing as to whether there was a hearing at which this matter could be introduced.

(Plaintiff's Exhibits Nos. 1 and 2 were received in evidence.)

Mr. McCullough: We all agree that there was a hearing in Kansas City on April 8th and 9th, 1946; that there was an opportunity in that hearing to introduce evidence. However, it was not physically possible in any respect to

introduce evidence in that hearing showing the effect of the Commission's order which was not entered until seven and one-half years after that hearing; that it would be impossible for a witness to testify to the effect of an order prior to the order being placed into effect. This order was placed into effect in 1953. The hearing you will recall was in 1946. We believe that the plaintiff should be allowed to describe its physical operation to show the effect of that order on those operations as of now. I think that that is information, factual information the court should have before it for those reasons.

Judge Van Oosterhout: Mr. Beardsley has been wanting to state some objections. I believe probably this would be the appropriate time for him to do that, Mr. McCullough.

Mr. Beardsley: If the Court please, my primary objection to the introduction of this evidence——

Judge Van Oosterhout: Now, in this matter you are representing the people you are appearing of record for and making this objection, or are you speaking on behalf of any others?

Mr. Beardsley: I am speaking on behalf of all the intervening defendants, the motor carriers, the trucking associations, the rail brotherhoods, all except the Government and the Interstate Commerce Commission.

Mr. Johns: And the Interstate Commerce Commission supports his argument.

Judge Van Oosterhout: Well, you will be given an opportunity to speak if you want it later. You perhaps prefer to hear what he says as to whether you want to adopt or supplement his argument.

Mr. Johns: Yes, sir, I am familiar with the argument, and we adopted that argument. He is arguing from the paper he has filed. We adopt that argument.

Mr. Beardsley: I might say at the outset the primary reason for the objection is not the nature of the testimony to be introduced. It is because as we understand the proceedings a three-judge court sits to review the order of

the Commission on the record made before the Commission, and as the Court has probably already noted from the memorandum which we filed in support of our notice or our request to limit the issue, the Supreme Court subsequent to the Seatrain decision did pass on the very question involved in this case, and the Supreme Court made it very clear that unless the Commission had deprived the parties seeking to show the confiscatory nature of the order which was proposed to be entered that the party could not come along later on before a three-judge court and introduce testimony which it had for reasons of its own not desire to put in before the Commission.

As a matter of fact, the point is made here it would be hard for the Frisco to show the confiscatory nature of the order, and yet that is precisely what Seatrain did before the three-judge court, even though the order had not become effective as to it. The Supreme Court in this American Trucking Associations case which we cite, and I hasten to say that that was the name of the case, that was the style of the case in the Supreme Court, however it involved an action brought by some motor carriers out in Indiana, I believe, dealing with the proposed leasing rules which the Commission was getting ready to promulgate. The effect of the rules was to require motor carriers to discontinue the practice of so-called trip leasing, to require them at any time they leased a vehicle to lease it for at least thirty days. The regular proceedings were had before the Commission and when the matter came before the three-judge court the motor carriers, plaintiffs there, asked the court to hear evidence respecting the confiscatory nature of these leasing rules which the Commission was getting ready to promulgate. The court there said that there was an opportunity before the Commission to introduce such evidence, plaintiffs had not availed themselves of it and that they did not sit to try the case de novo.

Now, at page 3 of our supporting memorandum we have

cited that case in the Supreme Court, and it is interesting to note that while the ultimate question before the Commission and the court was a little different, the specific matter which was involved was precisely the same as it is here, namely, the confiscatory nature of the order which the Commission proposed to put in, and the court pointed that out very clearly by even in the report having the heading in there, "Right to introduce evidence of confiscation". The court said, appellants assign as error the refusal of the district court—and I am paraphrasing—to permit introduction of additional oral evidence there. The offer of proof indicated it would concern the value of plaintiff's property and rights and the effect of the order upon said property and rights; and coming down a little further the court said, a claim of confiscation must be specific.

I think that they had ample opportunity to introduce matter relating to the confiscatory nature of those proceedings before the Commission. They did not choose to do so for reasons of their own, and under those circumstances we submit that this court does not sit to try that matter de novo anymore than it sits to try any other facts of this case, and if there is any validity to the argument that the record is out of date, so to speak, we would point out what the court sits for is to determine the validity of the Commission's action at the time it was taken, although years ago. There is no reason if the plaintiffs are permitted to bring that aspect of the case up to date that they should not bring the whole thing up to date, but again we believe the court sits to determine the validity of the Commission's action when it was taken and not as of now.

Judge Van Oosterhout: Mr. Johns, speaking both for the Interstate Commerce Commission and the United States?

Mr. Johns: And the United States, I presume.

Mr. Fitzgerald: All right.

Mr. Johns: As a practical matter, what Mr. McCullough

is attempting to do here is to bring testimony which was offered to the Commission up to date, in other words very similar testimony as to the effect of the Commission's proposed order or what the Commission was trying to do upon this railroad would be drastic.

Judge Van Oosterhout: And Mr. McCullough made the point that the testimony was taken before the certificate was revoked so the testimony then would have been anticipatory, and this is apparently testimony of the realization.

Mr. Johns: Yes sir. But the testimony in the Commission's reports—I am looking at the record in 62 MCC, at page 374, and in 53 MCC, at 428, discusses the same subject matter which is discussed in this proposed testimony this morning. In other words, they are showing you that if this order becomes effective they are going to be damaged. There is no question about that. The Supreme Court said in the Rock Island case: "Certainly a condition like we propose here is going to effect this railroad but that is beside the point, the point is the power of the Commission to do it". So we say that the evidence, similar evidence has been considered by the Commission we think it is a waste of time to hear this evidence today. That is the practical aspect of this proposition, besides the fact that this court sits as an appellate body, as a practical matter, and not to try these cases and hear evidence on them. So I say as a practical matter that the testimony of Mr. Bryant should not be heard.

Judge Van Oosterhout: Is there anyone further that wishes to speak by way of objection to this offer?

Mr. Highsaw: Your Honor, I assume the record shows the intervening defendant, Railway Labor Executives Association, join in the objection, and we concur in the reasons already given for it.

Judge Van Oosterhout: As I understand, Mr. Beardsley said he spoke for all appearing intervenors.

Mr. Grinnell: If Your Honors please, we would like to

make this short comment, we think that the difference between the ATA case and the Seatrain case is a matter of timing. In the ATA case the rules which the Commission proposed to enter were in fact before the parties at the hearing and extensive hearings were held. In our case there was no order, there was nothing when we went to Kansas City. Therefore, we could not predict the exact nature of the order and we now ask to put in this brief statement to show what in our opinion is the effect of the order upon our company. In other words, if we had had an opportunity, if we had had an order before us, if the Commission had said, "We propose to enter this order, you come to the hearing and appear and tell us what is wrong with it," that would be one case, it would be near the ATA case, but here we have a situation where the notice said—I will get it—"It is further ordered that applicant shall make available at the hearing a competent witness or witnesses for examination on all material and relevant facts recited in the application."

Now, the application was something that was filed approximately eight years before this notice was entered. It dealt with the purchase of particular parts of plaintiff's system. So you see all we were referred to in the notice was an application. We were not referred to any order or any proposed action of the Commisison, and that is why we say there is nothing we could have said or would have been in anywise accurate or comprehensive on the subject of the effect of this order, and we think that the effect of the order is something that should be considered by the court in determining its validity.

Judge Van Oosterhout: I have not, of course, had an opportunity to read the proceedings, but the purpose of this hearing was to modify the certificate?

Mr. Grinnell: It was not so stated in the notice, if Your Honors please.

Now, Mr. Bryant did in fact testify at that hearing. He testified and his testimony was offered in support of the

plaintiff's, Frisco Transportation Company, motion to discontinue the proceedings. Another man named Essex, no longer an employe of the plaintiff, testified. Essex was an accountant who testified concerning the financial status of the plaintiff. Now, that was all the testimony that plaintiff voluntarily offered in that case. It was all in support of plaintiff's motion to discontinue the proceedings.

Judge Van Oosterhout: Did you go into the question there as to the adverse effect?

Mr. Grinnell: As to one phase of it only, Your Honor. I think what Mr. Johns is referring to in this record, and there isn't any question but that Essex did in answer to some questions touch a portion of the effect of this new order but he was predicting, you see, I mean he was not testifying that is what it was going to do, he was saying in effect if this happened something else would happen.

Judge Van Oosterhout: Do you contend realization was much different than the anticipation?

Mr. Grinnell: I think that would be our contention. Actually Essex testified concerning a five-day study as to one phase only of this order; and that is why we think the record is incomplete as it now stands because there is no satisfactory testimony as to the real effect of the order, and there could not properly be because a man would have to be completely clairvoyant in order to say what the Commission was going to do after the hearing.

Judge Van Oosterhout: This testimony does not have any particular materiality on your principal contention that the Commission has no jurisdiction or power to alter the certificate?

Mr. Grinnell: That is probably correct, yes sir.

Judge Van Oosterhout: But it is on your constitutional grounds.

Mr. Grinnell: We get back to the constitutional grounds. Then there is no way we could have predicted in 1946 what the Commission was going to do even if their order had

been entered the following day because the facts were not there to enable us to predict it at that time.

Judge Van Oosterhout: Do you think this court would have any power to do anything other than perhaps remand it to the Interstate Commerce Commission if we do get to this particular issue; that is, we review the facts, that this is matter that they did not have before it on the record, we would be able to say that?

Mr. Grinnell: As I understand Your Honor's question now, I think this, and we are very much convinced, that the meat of this case is in the question of the Commission's power, and then in the question of whether or not it had sufficient evidence to support its basic finding. However, as a protection to ourselves we must necessarily go into the constitutional grounds which we think are present.

Unless the Court has some more questions—I think our basic idea is that the A. T. A. case does not cover this situation and it does not in fact overrule or in any way conflict with the holding of the Seatrain case because of the question of opportunity. We did not have it; the A. T. A. case did.

Mr. Fitzgerald: You Honor, this is esssentially a matter of principle not so much for this case but future cases because as a matter of fact we have already spent more time arguing about this point than it would take to read the statement the gentlemen wishes to put in; but as I look at the case it does not essentially involve whether or not they had the opportunity to prove whether or not the order would result in confiscation of their property.

Some of the things Mr. Grinnell just said will be difficult to answer without getting into the arguing of this case, and I refer to the point whether or not they had knowledge of the pending proceedings which the Commission had when it ordered hearings held as to the scope of the certificates. It is evident from what he said that they did offer some testimony, even if it was only five-day study,

that at least shows that they had an opporunity to prove any assertion of confiscation.

As a matter of fact, this statement, all it attempts to do is to bring up their alleged loss to the present date. Now, I know of no appellate litigation where a court is going to accept testimony as to what the effect of the order of the court is with respect to the appellant as of the day he is arguing before the appellate court.

If changed circumstances are such that it is confiscation or they are destructive of the business of plaintiff that was not apparent before, or that could not be conceived of by the court examining the record, then there are other remedies, but I think in examining this case and the action of the Commission, the Court has no authority to enlarge the record to make it current, and I say that this is not strictly a question of their being allowed an opportunity to prove confiscation. They had that opportunity, and we can all admit that if this order goes through they are going to suffer, they are going to lose certain business. The extent of the business as of the present date is not necessary to the court's determination as to whether the Commission's action was lawful or unlawful.

Judge Van Oosterhout: Is there going to be any particular prejudice if we would receive this testimony subject to the objection so it would be in the record for what it is worth, and we rule on it in connection with making our decision? There seems to be a lot of controversy about it, and it will take some time to look into the legal features of it.

Mr. Fitzgerald: I would hate to be met with a written opinion to that effect in some future case, that that evidence was admissible.

Judge Van Oosterhout: I think in writing the opinion we can pass on it. Well, if there is no objection probably we can expedite the matter here by receiving the testimony subject to the objections made, and then certainly rule on the objections if it becomes material.

Mr. Fitzgerald: That is satisfactory to the United States, Your Honor.

Judge Van Oosterhout: If we dispose of it under the first issue we probably do not reach this question at all, that is, if we find the Commission had no jurisdiction here then we do not get to this point at all.

Mr. Grinnell: That is satisfactory.

Mr. Beardsley: That is satisfactory.

Judge Van Oosterhout: Proceed. It is understood this testimony will be received subject to all the objections made today.

Mr. McCullough: I think for the purpose of the record we should ask Mr. Bryant if he were to testify if that would be his testimony.

Judge Van Oosterhout: If nobody cares to have Mr. Bryant read it.

Mr. McCullough: No, I am not asking him to read it.

Judge Van Oosterhout: You might identify the copy of the statement for the record, and then it probably can be agreed by everyone if Mr. Bryant testified that that would be his testimony, subject to the objection.

Mr. McCullough: Could we identify that as an exhibit number?

Judge Van Oosterhout: Well, I thought possibly so.

(The document, testimony of R. C. Bryant, was marked Plaintiff's Exhibit No. 5.)

Mr. McCullough: Mr. Bryant, we have identified Exhibit No. 5 here which is headed "Testimony of R. C. Bryant," is that testimony true and correct to the best of your knowledge?

Mr. Bryant: Yes, sir, it is.

Mr. McCullough: And if you are authorized to testify, that is what you would say?

Mr. Bryant: Yes, sir.

Mr. Griffin: If Your Honor please, may I present a question to counsel?

Judge Van Oosterhout: Yes.

Mr. Griffin: I notice several blanks left in the copy I have. I wonder if the original has those blanks. Page 4 has a blank.

Mr. McCullough: On page 4 the blank should be "Exhibit 1." I believe that is all, only one.

Mr. Griffin: There is one more.

Mr. McCullough: I think in view of the Court's prior ruling here that on page 4 that Exhibit blank should be eliminated and the word "map" inserted.

Judge Van Oosterhout: Very well. You say "map offered as Exhibit 4 but not received."

Mr. McCullough: Yes, map offered as Exhibit 4, that is correct.

Now, that concludes the evidence the plaintiff desires to offer.

Judge Van Oosterhout: Very well. Does the defendant desire to offer any evidence?

Mr. Grinnell: May Mr. Bryant be excused?

Judge Van Oosterhout: Mr. Bryant may be excused.

Mr. Johns: I have several items which we have had certified, Your Honor, and I would like to offer those. May we have a moment, sir?

Judge Van Oosterhout: Certainly. You might look them all over if you want to and possibly save a little time. How much time do you think it would take? Would it be worth while to take a recess? While counsel are examining the exhibits court will stand in recess for ten minutes.

(A recess for ten minutes was taken.)

Judge Van Oosterhout: Mr. Johns.

Mr. Johns: As I stated before, I have prepared other parts of the record to tender to the court and I would like to have them marked for identification purposes, please, sir.

Judge Van Oosterhout: Very well.

Mr. Johns: The first one is a copy of a memorandum from the Commission's Section of Finance dated April 26, 1939, addressed to the Chief of the Commission's Section of Certificates, and as the certification shows is contained in Docket No. 89913, Sub. No. 5. Attached to that memorandum and accompanying it is a copy of the Commission's report and order in the so-called Parker and Tolson purchase cases.

(The document referred to was marked Government Exhibit No. 1.)

Mr. Johns: The next exhibit is a similar one from and to the same people appearing in Docket MC-89913, Sub. No. 1, and it shows administrative handling of the papers in the so-called Hamm purchase which is involved in this proceeding.

(The document referred to was marked Government Exhibit No. 2.)

Mr. Johns: The third exhibit is similar documents on the so-called Cooper acquisition, and these documents appear in Docket No. MC-89913, Sub. No. 3.

(The document referred to was marked Government Exhibit No. 3.)

Mr. Johns: Then the fourth exhibit consists of similar documents covering the so-called Bennett acquisition proceeding and these appear in Docket MC-89913, Sub. No. 10.

(The document referred to was marked Government Exhibit No. 4.)

Mr. Johns: The next, which will be Exhibit No. 5, consists of three letters in the correspondence file of Docket No. MC-F-578 involving the Cooper purchase.

(The document referred to was marked Government Exhibit No. 5.)

Mr. Johns: Exhibit No. 6 are similar letters found in Docket No. MC-F-618, involving the Hamm purchase.

(The document referred to was marked Government Exhibit No. 6.)

Mr. Johns: Exhibit No. 7 are similar documents found in Docket No. MC-F-678, involving the Parker purchase.

(The document referred to was marked Government Exhibit No. 7.)

Mr. Johns: And the last one is one letter found in Docket No. MC-F-1037 involving the Bennett purchase.

(The document referred to was marked Government Exhibit No. 8.)

Mr. Johns: We offer those exhibits.

Mr. Grinnell: Plaintiff objects to the offer of Government's Exhibits 1 through 8, inclusive, on the ground that each and every one of these exhibits contains evidence which was not offered in the proceeding before the Commission although it was in existence at the time.

I might say that the portions of Exhibits 1, 2, 3 and 4, which is made up of reports of the Commission, of course we do not object to this court or the Commission or anybody else referring to a published report, and I think in each case those are published reports the citation of which is contained in the complaint.

Now, my objection should not be understood as going to the official report of the Commission, but we have here a situation now where the Commission at this late date and after hearing in this reopened proceeding now desires to offer evidence of things that occurred and correspondence that occurred prior to the date of the hearing which resulted in the order here under attack. Clearly the argument that these gentlemen made previously that they thought the record, or the record as made before the Commission, was what should be considered by this court in

determining the validity of the order, refutes or is a complete refutation of this offer of theirs because they now seek to offer independent evidence which if it was considered by the Commission was improperly considered because it was never offered at the hearing in this case, and this is the first time, today, that it has been brought into this case, any of these memorandums.

Now, on general principles memoranda from one section of the Commission to another section of the Commission is, if introduced in this manner, completely hearsay and self-serving. If they propose that these, or if they state that these are necessary to the defense of this order, it seems to me that the order must be invalid on its face because if these things are necessary to sustain the finding of the order we have a situation where there was not evidence in the record before the Commission, and when I say record I mean record of the hearing before the Commission, on which the Commission could base its order. If they had to go outside of that hearing record and into their other files and take documents that were passed back and forth between sections of the Commission, clearly we were not given a fair trial because we were never confronted with these things.

Now, I think that if we, as we have been accused of this morning, have tried to expand the record, this is a complete expansion because our testimony was limited specifically to matters which we could not have produced at the time of the hearing. These documents, I think we can take the date from one or any of them——

Judge Van Oosterhout: The Court has not had an opportunity to see the documents, so we are pretty much in the dark other than Mr. Johns' statement.

Mr. Grinnell: Well, Mr. Johns stated in connection with Exhibit 1 that the first document was, I think he called it an inter-departmental memorandum from the Finance Section to the Section of Certificates. It is dated April 26, 1939, that is almost seven years before the hearing was

held in this case, and yet this document was not put in evidence at the hearing. It is not signed. I think just on general principles it is a hearsay document in this case where we have held a hearing, and now they seek to bring in some other evidence to bolster their order. I think it is wholly improper.

Now, my objection as to the hearsay nature of these things goes to the documents in Exhibits 1, 2, 3 and 4, all of which are inter-departmental memoranda.

Those are the same exhibits which contain the report, and as I say, as far as introducing in evidence here the report, I do not think it is necessary at all. Perhaps the court has access to it, and if it does not any party, I am sure, would be willing to furnish copies of that because they are pleaded in the complaint, basically defendants all admit that they exist and that they are part of the record of the Commission.

Now, as to the other Exhibits 5, 6, 7 and 8, my statement that this is an attempt to expand the record applies with equal force to these documents because, taking Exhibit 5, the first document, is a letter signed William W. Dalton, counsel, on the letterhead of the Frisco Transportation Company, and it is addressed to Mr. Bartel, Secretary of the Commission. I do not see anything in it that could be used as an admission against interest, but while if it was going to be used as an admission against interest it should have been put in at the hearing so we are confronted with it and we would know what the charge was. So I think it is wholly improper to now introduce it. This letter by the way is dated June 8, 1938, which was almost eight years before the date of the hearing.

Judge Van Oosterhout: Correspondence in connection with the original application for approval of the transfer?

Mr. Grinnell: Apparently so, Your Honor, from their dates.

There is another letter. The second letter in this Exhibit 5 is a letter signed by W. L. English, General Man-

ager, on the Frisco Transportation Company letterhead, and it also deals with the Cooper purchase; and the third document is another letter signed by Mr. Dalton as attorney for the Frisco Transportation Company.

Now, those things, if they are to be used here against us they should have been in this hearing, and I think it is an attempt to expand the record because the Commission, I do not think they will refute me, offered no evidence whatsoever at the hearing in Kansas City, and that is the hearing which is the basis of the order which is under attack in this case.

I think that these documents, the documents in Exhibits 6, 7 and 8, are all of the same nature as those I have described in connection with Exhibit 5. These are not admissible in this case because they are documents that were in existence at the time the hearing was held and were not offered, and now it reopens and attempts to bolster the record with additional evidence, and if those letters from the Frisco Transportation Company are offered as an admission against interest I do not even think they qualify on that ground.

Mr. Johns: Perhaps I should have explained the purpose of the offer a little more than I did and let Your Honors know what this is all about. As I say, it is our view here the only point this court is concerned with is whether or not we inadvertently issued these certificates. The plaintiffs claim there is no showing of inadvertence here. We have brought papers here showing administrative handling before the Commission itself to show that inadvertence occurred.

Now, back in the early 1940s the Commission was made aware through formal proceeding that there was something wrong with these certificates and by the order introduced here today in January, 1945, the Commission reopened every single one of those old finance proceedings. They reopened the sub numbers. In other words, you have a finance proceeding, B purchases rights from A through

an MC-F number, and then those rights are put into a new docket number called a sub number. The Commission reopened not only the finance proceedings, those MC-F dockets, but also the sub number dockets. If you will refer to the printed report on pages 382, 383, 62 MCC, that will show you what the Commission did, 62 MCC, you will see at the bottom of the page, the page number is 382 and 383. Now, those are the proceedings covered by the Commission's reopened hearing, all of these old finance proceedings and all of these sub numbers which were assigned to cover the purchase rights. All of these dockets are involved in this proceeding, so we do not have a question of going outside any record. We are offering these to show the administrative handling in the Commission, to show you clearly that there was an inadvertent error.

Now, if I might just take a moment here to illustrate. This is Exhibit 1, and it involves the Parker purchase. Now, after the Commission approved that purchase with the condition in the order, this proviso, that the operation should be conducted as an auxiliary supplementary service, our section of finance that had the duty of processing that report and which wrote the report, sent a memo to the section of certificates, and the covering memorandum says it is from J. E. D., which is J. Edward Davey, Chief of that section.

Judge Van Oosterhout: Are those memorandums confidential for department use?

Mr. Johns: No, sir, these actually appear in the public dockets, and that is the reason we are offering them here to illustrate our point of inadvertence. It is two reports. It is the official public docket and he tells Mr. Roberts, "Attached is a copy of the report which the Commission has approved. It is assumed"—this one is not as good to illustrate the point as perhaps, let's take another. This is a different form, this is the form I am familiar with. Let's take the Hamm purchase, a very similar memorandum, except in paragraph 5 it says, "Copy of decision is

attached and should govern in preparation of certificate or permit as result of unification. Certain salient features pertaining thereto are identical by red pencil on the copy being transmitted to Mr. Roberts, but such phraseology should be considered in the light of the context of report and order."

Then when you get over to the back of it invariably in every one of these cases Mr. Davey had underscored in red ink this proviso, which reads this way: "Provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said railway company, and shall not unduly restrain competition."

Judge Van Oosterhout: Which case is that in?

Mr. Johns: That is the Hamm case.

Now, in the Bennett case the provisio was actually, the section of certificates did actually put that proviso in.

This is part of the report, and it is copy of the report that went from the Section of Finance to the Section of Certificates showing the administrative handling.

Judge Van Oosterhout: And the matter of pleading, if I recall it correctly in all of the matters that you conceded in the pleadings, there were no restrictions in the original order, no restriction in the certificate.

Mr. Johns: No specific restriction, just this proviso.

Judge Van Oosterhout: What is the difference between a proviso and a restriction?

Mr. Johns: Well, the proviso says that the—it represents power in the Commission to restrict in the future. In other words, when these carriers were started originally in 1937, this carrier wanted to purchase rights. The Commission could not say just specifically what restrictions were necessary because it was a new operation, they were buying rights here and rights there, and it is only after you get a tested picture that you can tell particularly from these key

point restrictions just what to do about the operation, and the Supreme Court has said in the Rock Island case if we put the proviso in the certificate then we may later further restrict that operation to insure that it is supplementary or auxiliary to the rail service.

Judge Van Oosterhout: Do you concede that that has not been done here in any case other than the Bennett case?

Mr. Johns: No, it has not even been done there. Oh, yes, that is true, the proviso is contained in the Bennett certificate but no specific restrictions, and that is where——

Judge Moore: No specific what?

Mr. Johns: No specific restrictions. In other words, these key point restrictions and things like that.

Judge Van Oosterhout: Your certificate reserves some rights?

Mr. Johns: Yes, sir, some right, and in the Bennett certificate, of course, we specifically reserve the right; in other five certificates we did not, and we are attempting to show why the failure to add that proviso to the other five certificates was through inadvertence.

Judge Van Oosterhout: Wasn't that probably argument, and now that we are in that field, isn't that the way probably the Commission handled most of those things at that time? I mean during the time that all of these others, Bennett went through, wasn't it the routine way of handling it, was it any different from the way other transportation requests were handled?

Mr. Johns: I want to understand Your Honor.

Judge Van Oosterhout: During this period that these went through, there were probably some other railroad subsidiaries, was it the practice generally to issue unrestricted certificates in all cases?

Mr. Johns: No, sir. The practice was to issue restricted certificates. In fact the Rock Island case points out that by the time of that case which was—well, I can't recall the date now, there had only been 120 of this type of cases, and in the Crescent case, I believe it is 320 U. S.,

the Supreme Court points out we had at that time 80 or 90 thousand applications pending for rights, so you see in a day's handling of a group of motor carrier certificates you could lose these, and that is the way this inadvertence occurred over in the Section of Certificates, and we offered these first four exhibits to show the administrative handling, to illustrate the Commission's statement just made in the Division report of this administrative handling, we show you in black and white here how it was handled.

Now, these other four copies are copies of letters, and they are very damaging to the railroad because after the Commission approved these purchases subject to this proviso—I am looking now at Exhibit marked 8, Mr. English, the General Manager, wrote this letter to Mr. Bartel, and in the second paragraph of it he says, "The Frisco Transportation Company desires to consummate purchase of Mr. T. N. Bennett, in accordance with terms prescribed in Commission's order, above referred to. The transaction will be completed and the line taken over on Monday, March 25th." To consummate that transaction pursuant to the conditions in the Commission's order and the statement certainly is against interest as we look at it today. These incidentally are contained in the correspondence section of each one of these finance dockets, but they are correspondence from the railroad affiliate itself. We say they are most damaging statements so we offer these as parts of these public records, public records which the Commission is considering in this report. In fact, if I may say this, Your Honor, we make the point that the plaintiffs have not introduced the entire record here, they have only introduced this hearing in 1946, the notice of the hearing, the hearing itself and things subsequent to that. They had not introduced these MC-F dockets and they have only introduced part of the record. We are putting in some very pertinent other parts of that same record and they are offered simply as illustrating the

Commission's explanantion in its report of how these matters are handled and why this inadvertence occurred.

Judge Van Oosterhout: It is very difficult for the court to rule on matters not having an opportunity to examine the proceedings and the exhibits and see how they fit in and whether they are really in fact part of the reopened proceedings. It is hard to determine that without further study of the situation so I believe that the ruling on the admission of the exhibits will be reserved.

Mr. Johns: That is certainly satisfactory.

Mr. Grinnell: We have no objection to it being taken with the other and passed on with the whole case.

Judge Van Oosterhout: Is there anything further in the way of evidence? Is there anything further in the way of evidence as far as the Government or the Interstate Commerce Commission having to offer?

Mr. Johns: No.

Mr. Fitzgerald: I have nothing, Your Honor.

Judge Van Oosterhout: Do the Intervenors have any evidence they desire to offer?

Mr. LaTourette: We have none to offer.

Judge Van Oosterhout: Is there any rebuttal evidence on behalf of Plaintiffs?

Mr. McCullough: No, we have no rebuttal evidence.

Judge Van Oosterhout: The record then is closed. We reach the question as to what should be done in the way of argument.

The Court has discussed the matter briefly and it is agreeable that each side be permitted to file written argument, and the time indicated in Plaintiff's suggestion is reasonable but it is the thought of the court to clarify our thinking on the issue and also that possibly it may narrow the issue somewhat that it would be desirable to have some type of oral argument here, at least to the extent of indicating what the issues are and see if we can't narrow down just what the issues are that are in controversy. Beyond that it is not necessary for the parties

to argue it any more extensively than they may desire, that will be left to the discretion of counsel, but I think at least we ought to develop what the position of the respective parties is, and then it may save all of you some time in preparing your written briefs if you know what the real issues are that are in conflict. On that basis the court will hear from plaintiff at this time.

Mr. Grinnell: Your Honor, it would probably take me about thirty minutes and I would like to have some time to reply to any argument that is made. I do not know whether the defendants have any.

Judge Van Oosterhout: Well, I think as long as we can finish today—we could stay until tomorrow, but I think we can complete the argument today. We will operate until about twelve-thirty and we will recess until two.

Mr. Grinnell: I am sure I can be finished before that time.

Judge Van Oosterhout: Mr. Grinnell.

ARGUMENT.

Mr. Grinnell: May it please the Court, we, this morning in discussing some of these subsidiary matters, have had statements of various facts in this case, but I think in order to properly frame the issues I will attempt to make a complete statement of the facts.

As the Court knows this case seeks to have enjoined and set aside an order of the Interstate Commerce Commission which was entered on December 7, 1953. That order was entered to carry out and put into effect the report of the Commission on oral argument which was filed the same date. That report discusses six basic proceedings by which the plaintiff acquired portions of its now over-all operation.

The map will show that the plaintiff operates an extensive motor common carrier system through seven states and totalling a little in excess of 34 hundred miles. This system was by and large gathered up or placed, brought

together by the purchase of previously existing motor carriers, both as to their operating rights and their physical properties. In other words, under Section 213 of the Interstate Commerce Act, of the old Section 213 or under Section 5 of the Interstate Commerce Act which now embodies the finance and purchase provisions, the plaintiff purchased an existing motor carrier and replaced him in the transportation field. Now, this case involves six such purchases, and those are the purchases that are shown, or the routes of those purchases of those vendors are shown in color. We will throughout our argument and we will also carry it over into our brief, refer to those particular segments by the name of the man from whom they were purchased; in other words, when we talk about the Hamm purchases we are talking about the purchase from John Hamm, which runs between Miami, Oklahoma and Joplin, Missouri. We do this because the sub numbers and the MC-F numbers and everything else can become confused or confusing to one not accustomed to it. We think calling them by their name identifies them sufficiently.

Judge Van Oosterhout: Mr. Grinnell, on the legal issue of the power of jurisdiction of the Commission, why the situation is pretty much the same, isn't it, on all of them except Bennett, that is, the legal issue would be the same as to the other five?

Mr. Grinnell: I think that is correct Your Honor. The Bennett is different from all these cases. In the first part of my argument I do not even intend to refer to it. I will comment on Bennett separately.

Now, the order in this case does not place any restrictions on the Rose certificate between Hugo, Oklahoma and Paris, Texas, but it does find that certificate was inadvertently issued and goes on to find no modification was necessary so we do not have any complaint about that. In the final analysis they have not done anything down there to us, but insofar as the report and order find that that

certificate was inadvertently issued, of course, our argument will apply to it also. So really the case boils down to four segments, Hamm, Cooper, Parker and Tolson. Primarily our argument will be addressed to the handling on those segments.

Now, the Commission reopened these six proceedings by its order of January 4, 1945, for reconsideration, and that order provided that there would be an Examiner's report which was filed about a month later by Examiner David Waters in which he made the finding that the certificates had been inadvertently issued and there should be some restrictions placed on them.

After the plaintiff filed exceptions to that report the matter was reopened for further hearing by an order entered May 28, 1945. Then nothing happened for approximately a year and on March 8, 1946, the plaintiff was given a notice of hearing which is contained in the Exhibit 1 that was filed this morning.

The hearing was held in Kansas City on April 8, 1946, and as I said earlier this morning the plaintiff offered two witnesses, Mr. Essex and Mr. Bryant. They were offered specifically and the offer was limited to the support of the motion to discontinue which had been made at the beginning of that proceeding. The plaintiff then rested. The Examiner inquired whether or not the plaintiff did not have some additional evidence and the plaintiff said no, and I am not quoting exactly, but in general the Examiner said we have to have some additional evidence here, and so by agreement and with the agreement that plaintiff's objection would go to all of this evidence, and no objection to it for having had to produce it or to the evidence itself would be waived, the plaintiff, the following day produced Mr. English who was then general manager of the transportation company, whose testimony was confined to a general description of the over-all operations of plaintiff. I say general. It actually got into quite some detail and Mr. Gleaves who was not an employe of plaintiff here

but an employe of the parent railroad, and who testified concerning the merchandise car, freight car procedures of the railroad. Now, as I said this morning, Essex had testified on only financial matters. Bryant's testimony at that hearing is really shown more fully in Exhibits 10-A through 16-A that are in that record. Those exhibits contained various documents, letters, docket notices and what-not, things that occurred between the approval by the Commission of these basic finance purchases generally in late 1938 and early 1939, and the issuance of the certificate in 1942. I might add that no other party, no intervenor or the Commission or no one else offered any evidence at that hearing, so that as the record stands it contains evidence running, I think, to its whole existence up to 1946. It contains Bryant's testimony together with these exhibits which show things that happened after the rendition of the financial report and before the issuance of the certificate, and then I think 16-A contains an up-to-date certificate of that time. Each one of these exhibits is confined like, for instance, 10-A is confined, I think to Hamm, and 11-A to another purchase and so on, and 16-A is a gathering of all the certificates, so that was the evidence that the Commission had before it on this reopening.

The Examiners in 1948 rendered their report and they again found that the certificates had been inadvertently issued. Division 5 rendered its report after exception by the plaintiff, and in 1951—and that is the copy, Mr. Johns has given Your Honors a copy of that—then in 1952 the matter was reopened for argument before the entire Commission which was held in November, 1952, and then in December 7, 1953, the report and order, that is, the basic order which is here under attack were published; and we filed petition for reconsideration which was denied in April, 1955, and in May, 1955, this suit was filed and temporary restraining order granted.

Now, the report on oral argument to my mind, and to say the best for it is unsatisfactory in its discussion of

what the Commission is holding or why it is holding that these certificates were inadvertently issued. On page 380 of this report they have a section entitled "Findings"—just a sentence or two: We find that these certificates issued to the Frisco Transportation Company in the proceedings listed in the appendix were inadvertently issued. Now, from that they except the Bennett; that such certificates except the Rose should be cancelled and at the same time new or amended certificates should be issued in conformity with the findings shown in Part 2 of Appendix A.

Judge Van Oosterhout: In effect, Mr. Johns made some statement in arguing that evidence that all these various proceedings in connection with the transfer were reopened.

Mr. Grinnell: Well, no, these six were reopened.

Judge Van Oosterhout: That is what I mean, the ones that are in controversy in this case, they were all reopened from the start.

Mr. Grinnell: All of them were reopened from the start, but as I say at the hearing there was nothing done, nothing introduced as to anything that occurred prior to the hearing and subsequent to the orders in those other cases or the reports exeept Bryant's testimony and Exhibits 10-A through 16-A. In other words, there was no reference at least in the hearing to any part of the transcript before that. I think the only reference to this, in this report is a statement.

Judge Van Oosterhout: In your petition, Mr. Grinnell, you allege this A, B, C and various transactions, that the original order did not contain restrictions, that the certificates did ont contain restrictions, and to some extent that the concession, perhaps on your part, those things might be?

Mr. Grinnell: Oh, there is no dispute between us and the Interstate Commerce Commission as to those facts; some of the other parties deny knowledge, information and belief as to some of the facts, but—and we say the reason we drew our complaint in the manner in which we

did was to attempt to reduce the argument down. There isn't any attempt, for instance deny that we applied for these things, that there was a hearing before the Commission in connection with the purchases, and I think it even says in here at one point that admittedly we introduced evidence to show that these rights could be used along with the railroad. Now, of course, there may be an argument between us as to the weight of that evidence, but it is our view the report in each one of these cases take care of that and bring it down to the end of that hearing, proceeding, and we have no need to make the points we are going to make here to go beyond those. I do not know whether the Commission desires to go back into the actual transcript of the hearings in those underlying proceedings or not, they have not given any indication.

Judge Van Oosterhout: Well, the petition is set out. I do not know that it did. On your inadvertence matter it might be important to go back to see what the original application was.

Mr. Grinnell: Well, I have looked at those but I would not want to say whether it contains that specific statement or not, but I do not think there is any disagreement with the statement that in each case we did in part base our case upon the use of the transportation company and those rights in connection with the railroad service. Now, it is our view that we were going to use it both ways and that there is testimony in all those records that we could use it both ways, and there are decisions of the Commission, there is one particularly which we will refer to in our brief which summarizes the evidence that was generally put in those cases and I think it can be fairly said that our evidence followed generally that same pattern. But it is our view of this case that with the record standing as it did on the reopening—now, of course, there could be no inadvertence prior to the time that the original order came out, at least they do not make any claim that there was. There wasn't any inadvertence in the handling

of the underlying purchase proceedings from the time the application was filed up until the order. They do not maintain there was any inadvertence in the order and the Commission does not find any.

The Commission finds that the certificate was the document that was inadvertently issued and their language in making that finding or their language in expressing their conclusion is, I think, extremely important in this case because it is this:

> "We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase."

And this is the thing that really is revealing about their reasoning:

> "To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued."

At no point in this entire case do they ever discuss, or in this entire report do they ever discuss how, why, when or where the inadvertence occurred except to say previous to that, and we are somewhat at a loss to understand why they threw that in, this statement, that if error occurred, it occurred in the compliance orders. Now, for some reason after saying that they just dropped it, because they don't find that the compliance order is the inadvertently issued document, but they go on and find that the certificate was. Now, that is the reasoning in their opinion, and there is no question but that the order cancels the certificates. That is their finding, and that is what the

order says, the certificates in these various proceedings be and they are hereby cancelled.

Now, the first question we raise is whether or not the Commission has the power to cancel certificates on the grounds of inadvertence. In this opinion they justify that power or find that they have it by reason of, or they use as authority for their holding a decision of theirs in the case of Smith Bros.—Revocation of certificate, which is reported in 33 MCC and is cited in this opinion.

Now, in the Smith Bros. case the Commission in a very pointed paragraph said that there has to be an end to these proceedings before us, and sometime they have to stop this going and coming and going and coming, and the certificate is the end of the proceedings and can be compared to a final judgment in a court proceeding. Now, then after that statement with regard to the nature of a certificate the Commission said this, and it is the basis of their action in this case:

> "In expressing the views above stated we do not desire to be understood as holding that a certificate obtained by fraud or misrepresentation or one issued in error by this Commission may not be changed or revoked without proceeding under Section 212 (a)."

Now, Section 212 (a) is the section and the only section in the Motor Carrier Act which provides for revocation of certificate, and that is where their power is set out.

Judge Van Oosterhout: There is no contention made that that section has been complied with here?

Mr. Grinnell: No, they are very clear that they did not comply with it because that section provides for revocation on willful failure to comply with law, rules or regulation.

So what they have done or what they did in the Smith case was take Section 212 (a) which they were considering and say, we imply in that section, which limits our

powers, there must be a power to revoke a certificate that is inadvertently issued. Now, that implication of power is what they used here. They attempt in this opinion to bolster that implication by saying that this power is impliedly approved by the United States Supreme Court in what we call the Seatrain case, United States against Seatrain Lines, which is 329 U. S. 424. Now, here is the language that they quote in this opinion as bolstering or giving the blessing of the Supreme Court to their implied inadvertence power. The Supreme Court said this:

> "We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded that the issuance of the original certificate was not an inadvertent error",

and so on.

Now, I think it is an unjustified implication that the Supreme Court has approved their power in connection with inadvertence when the Supreme Court has specifically said that they are not going to pass on it. I just do not think you can state implied approval from that language in any case.

Now, the next time or perhaps not the next time the Supreme Court considered their inadvertence power, but the last time that they considered their inadvertence power was in January of this year. The Supreme Court then granted a motion to affirm in a case called Watson Bros. Transportation Company against the United States which was tried, if I recall, in Iowa so that it was in this circuit.

Judge Van Oosterhout: Nebraska.

Mr. Grinnell: Was it tried in Nebraska? I did not recall that.

Now, here was the situation in the Watson case, and we think that it completely and forever, at least now it makes the latest ruling, stops this inadvertence power and holds that it does not exist.

Watson Bros. had through the years assembled a fairly large motor carrier system. On some of their routes they had the authority to haul Class A and B explosives. They filed an application with the Commission seeking a certificate which would authorize them to transport explosives over all of their routes. During the hearing in that case the application was amended to seek authority, additional authority to serve four United States Government arsenals that were located near their present operation or their then operation. The Trial Examiner in that case recommended the transportation company be granted authority to transport dangerous explosives to the four arsenals involved. There were no exceptions to this report and the Commission subsequently issued a certificate which authorized Watson Bros. transport general commodities to the four arsenals. Now, general commodities is the larger of the two and does not actually include explosives. As I understand you have to have another authority, general commodities does not mean everything. The Commission has a standard definition of that.

Now, after the issuance of this certificate Watson Bros. expended substantial sums of money in purchasing equipment to be used in rendering the service authorized by the certificate. Thereafter, on the grounds that the certificate had been issued as the result of a clerical error the Commission without notice or hearing issued an order which changed the certificate to provide only for the hauling of explosives to these four arsenals, and that was the case that came to the three-judge court in Nebraska, and here is what the court held, it is just a short sentence, I would like to read it because of the language:

> The certificate issued on July 19, 1949 granted plaintiff authority to transport general commodities to and from the four designated ordnance plants. The order of August 25, 1953 restricts this authority to the transportation of Class A and B explosives. Since

> the latter order was issued without notice and hearing and for reasons other than those stated in Section 212 (a) it is invalid,

and then the court went on to say:

> Counsel for the Commission argues that the order of August 25, 1953 merely corrects a clerical error in the certificate of July 19, 1949. Even if the court were to assume that the Commission has the authority to correct clerical errors without notice and hearing the result in this case would not be different because it is the holding of the court that the order of August 25, 1953 is more than the mere correction of a clerical error and is an attempt made contrary to Section 212 to revoke and change a certificate duly issued.

Now, in that case Judge Johnson dissented and his dissent shows that what they really meant to do was say when a certificate comes out you can't bring it back on the grounds that you made an error, and that was the basis of his dissent, but it indicates how clearly the court feels about this inadvertence problem, and the fact that the Supreme Court affirmed that on motion to affirm when there was one circuit judge dissenting seems to me to say that the Supreme Court now feels that if it is not in Section 212 (a) you can't revoke the cetificate, and there is no claim, never has been any claim in this case that the Commission was proceeding under 212.

Now, this case, if anything, presents even a stronger case than does the Watson case because here the plaintiff had been in operation from 1939; the certificates were issued in 1942 in most of these cases, I think in all the ones that are involved in the inadvertence plan. There was never anything done until 1946. Then they were reopened. Nothing was offered at the hearing as to how, why or where the certificate got out in the way it did; and then they come out and say, "We made a mistake."

Now, I think that the Watson case absolutely forecloses the position taken by the Commission. I think it holds that they do not have the power to correct a certificate for clerical inadvertence. I do not think that it goes beyond the certificate, but I think that as to the correction of a clerical inadvertence in a certificate the law now is that there is no such power because it is not written into Section 212.

Now, I mentioned previously in this discussion United States v. Seatrain Lines. That case and what it holds, the principle it stands for, represents a second reason why we think this order is invalid. In the Seatrain case the Commission cancelled and reissued a certificate which had been granted to Seatrain Lines. They did it after—well, perhaps I should say that the certificates which they had given to Seatrain are what would basically be called an unrestricted certificate as a water carrier. After that certificate was issued the Commission decided in another case that these people who engage in this car ferry service—if Your Honors are acquainted with Seatrain, they have the type boat where an entire freight car, a number of freight cars can be transported on boat, taken off and transported further by rail, that they give them a different kind of certificate for that kind of service, for that operation. That was in Foss.

Now, after the Foss case they came back and changed, proposed to change the Seatrain certificate on the ground it had been inadvertently issued and they did not mean to give them that kind of authority. The Supreme Court said that you can't do that, you can't change the certificate in order to carry out or place into effect a policy which you conceived after the certificate was issued. Now, we say that they did that here, and I know we are going to get an awful lot of argument on this because it was raised in the Rock Island case and they got a lot of argument. I am not exactly clear myself what the Supreme Court has held on it, and I do not think any of them are.

But here is our position: These cases were tried in 1938. The reports were in the latter part of 1938 and 1939. They contained this reservation that Mr. Johns mentioned reserving the power in the Commission to further limit or restrict so as to insure that the service will be auxiliary and supplementary to the parent railroad. Now, the first case in which the Commission ruled upon that kind of an operation was what is called the Barker case. The Barker case is a case, the subsidiary, Pennsylvania Railroad buying Barker. As I recall, the limitations placed in the Barker case were strictly geographical. They said you can't go outside the general scope of operation of the railroad; you have got to get rid of these things that are away from the natural territory of the railroad, but nothing was said about the kinds of service you can render. In other words, plaintiff here and these other rail affiliates render two kinds of service. They have first service that they perform directly for the public. It is a common carrier truck service on truck rates at truck billing. They also have what they call substitute service in which they handle freight for their parent railroad as a substitute for the railroad service. That traffic moves on rail rates, on rail billing, and the division of the revenue between the trucking company and railroad is a matter of contract. As a matter of fact, I think some of these people represented here substitute for us at some places where the Frisco Transportation Company does not.

Now, there were no restrictions in the Barker case, they were only geographical. Now, they used in some of these cases the phrase "auxiliary and supplemental," and then in January of 1943 the Commission decided a case in which the Texas & Pacific subsidiary was involved, and for the first time they defined or said what they meant by auxiliary and supplemental, and said that it meant that you can't handle, when you got that provision in your certificate, you can't handle all out truck freight, in other words, directly for the public on truck rates at truck billing.

Now, the Texas & Pacific case was not a purchase case; it was not a case in which the T&P motor subsidiary was attempting to buy an independent motor carrier. The first case in which the Commission ever used this construction of auxiliary and supplementary, or in which it actually placed any restriction as to the kind of service that could be rendered by this rail affiliate motor carrier when it was in a purchase case, where they were purchasing someone else, was in a case which was called Pacific Motor Trucking Company—Purchase—Valley Motor Lines, and appears in 39 MCC 441, December 23, 1943.

Now, that case is not a real clear-cut case actually, because the restrictions which were imposed carried out some prior restrictions in their rights. This company had made a previous application, in which it sought in the first instance to go in and prove up the convenience and necessity, and that the convenience and necessity required that they be given this operation, so that the restriction placed in this purchase case involving the rail-affiliate was a carry-over, so it was not really an imposition in the first instance. The first real clear-cut absolute limitation on a rail-owned affiliated truck line which absolutely prohibited the performance of this all-out truck service was Southern Pacific Motor Transport purchase at Trinity, which was decided in 1945. Now, if my recollection of the timing of this thing is correct, this application to purchase Trinity was filed before the reopening in our case, that is, before January 4, 1945, but the case was decided afterwards so that the two were in process before the Commission at the same time. Now, the manner in which they placed this complete restriction on the Southern Pacific purchase of Trinity was so simple that it is hard to believe that they ever intended anything else or that they ever intended that in the early days that they were to be restricted solely to the handling of substitute freight for the railroad, because all they did was put the word "Solely" in the same thing that they have been using for years. In other words,

they had been going along for years with this reservation and then, after they decided in the Texas & Pacific case that when you used "auxiliary and supplemental," the railroad could not engage in the all-out truck business. Then when it came along and had occasion to apply that ruling to a purchase case, all they did was slip in the word "solely." Now, the English language did not progress so much during that period that they did not know before the Texas & Pacific case that if they intended that that should not be used for the performance of all-out service all they had to do was insert the word "solely." Now, we think that clearly the timing of these facts represents far more than mere coincidence, because at the same time throughout this period we were being granted certificates which are not involved here, which were not in any way restricted. We got one from the purchase of Reddish, a man named Reddish, February 5, 1940; we got one from purchasing Blake, which is contained in that same opinion; we got one from purchasing Ozark Truck Line. I think it does violence to any idea that the Commission intended this all along when all through this period they gave us rights completely unrestricted either in the opinion or in the certificate. Now they come along and say, "We did not intend to give you those unrestricted certificates." What actually happened, when you take all these things into consideration and line up all the dates, is that after the Texas & Pacific case they decided they had to restrict us and proceeded to try and do it. The only grounds they could find was an inadvertence, and I do not think they proved inadvertence; but that is our second point, that what they actually did was to place these restrictions in a certificate in order to carry out a policy that they had formulated after the unrestricted certificates were issued. Now, under the Seatrain case they can't do that; and likewise to cancel certificates for that purpose would be contrary to 212.

Now, in connection with the finding of inadvertence, the

reasoning of the opinion which I read previously, the phrase to the extent that the certificates issued failed to reflect the character of authority, and so on, that has survived I might add from Examiner Waters' report, through the report of the Examiners, through the report of Division 5 and all the way into the report of the Commission. It is not surprising that they had to do that because there was not any evidence as to how, why or when any inadvertence occurred, so they were left with the situation of having a report which contained what they claimed was a restriction. Actually it was, we think, put on in order to satisfy a condition of the statute and they thought that was satisfying it. It contained the reservation or the proviso, the last clause reserving the right, and then you have the fact that the certificate did not have it. Now, they have not used any other facts in reaching their conclusion, just those two, a reservation appears here, it does not appear here, and therefore it must have been left out by reason of inadvertence. Now, that is faulty reasoning, it is poor logic because those two facts and those two facts alone give equal support to the completely inconsistent conclusion that it was left out intentionally. If you have no other fact that the omission, or appearance here and failure to appear here, with nothing about what occurred in between, of course you can infer that somebody made a mistake, but you can also infer with equal validity that what happened was that it was intentionally left out.

Now, the Supreme Court has condemned that kind of reasoning. Pennsylvania Railroad against Chamberlain, which is 288 U. S., condemns it specifically; 333 is the page number when they said:

> We therefore have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences, in which event neither of them is established, and judgment as a matter of law must go against the party upon whom

rests the necessity of sustaining one of the inferences as against the other before he is entitled to recover.

Now, that was a federal employer's case, but the Courts of Appeals have consistently applied the same reasoning to the review of orders by administrative agencies. One such case is Bethelehem Steel against NLRB, where they say this, and I think it is a very important matter in this case:

> Under the system of law guaranteed by our Constitution, the subsidiary facts must be reached from the evidence and the ultimate facts from the subsidiary facts, not arbitrarily or by an assumption or conjecture or by a process contrary to reason but according to reason.

Then they say:

> To safeguard the integrity of finding of ultimate fact arrived at by inference, the law has established certain principles with reference to the dependability of inferences,

and then they restate the rule from Pennsylvania against Chamberlain.

Now, I can't arrive, and I think that Your Honors will be in the same position, you can read this opinion and reread it but you always come back to the conclusion that the only basis for the finding of inadvertence were these two facts, that a reservation appeared here and did not appear here, and I think that when they did that they used faulty logic.

Now, their logic was bad and could not be used for an additional reason, which is also taken up in the Chamberlain case and in the Bethlehem Steel case. It is the old principle that you cannot use an inference when you have positive uncontradicted evidence to the contrary, and there is such evidence in this case.

Judge Van Oosterhout: Is there any evidence in the case, Mr. Grinnell, as to any uniform practice that they adopted in connection with the railroad affiliated trucking lines in all other cases except these five?

Mr. Grinnell: There is nothing like that in the evidence. I say the Commission offered nothing, they don't decide——

Judge Van Oosterhout: No explanation?

Mr. Grinnell: They don't decide this case on the basis of that.

Judge Van Oosterhout: No detailed explanation?

Mr. Grinnell: No. The Division 5 opinion contains a section in which that division attempts to take judicial notice of the internal processes of the Commission. That section of the Division 5 opinion is absent, and very conspicuously absent from the final opinion. I think that the reason it is not there is that there are some Supreme Court cases which very clearly and in unmistakable terms condemn the use of judicial notice by administrative agencies when they are making their findings. In other words, they can't take judicial notice of something that is not common knowledge, and their internal processes are not common knowledge. There are now provisions, of course, for publication in the Federal Register of the processes of which they want persons to take judicial notice or of which they want to take judicial notice which they want the public to know, but here you have a situation where it is left out of the main opinion of the Commission.

We, of course, attacked that reasoning very much in our petition for reconsideration, and I think that it is bad, because it is almost like saying, "Well, we sat down here, we did it this way"—no advice to us about what they were doing, nothing in the hearing that said that; we had no chance to refute it or anything else, and I think that is why it was left out of this last report because the Commission just became convinced that it was not good reasoning; but I think it does indicate that Divi-

sion 5 realized that they needed something else, just as these things they brought in this morning would indicate that they now feel that they need something else, or that they have something that they did not put in the hearing that may help their case; but I think all of those things go to show that there wasn't any evidence to show how, why or when this thing happened.

Now, in the testimony of witness Bryant and in these Exhibits 10-A to 15-A which gather together documents and letters and other things that occurred in that period between the time the order came out and the time the certificate was issued there is one document that absolutely refutes any claim that there was inadvertence in this case, and that is the document called the compliance order. In each of these proceedings, these underlying proceedings, they were all in the year 1939, there was not a compliance order, but in each of these other proceedings there was, an order was issued which authorized the issuance of a certificate to the plaintiff. Those orders—I think the Hamm is the first one here, yes, this is Hamm. The order was issued on March 14, 1939, that is after the opinion had come out, the opinion in that case was November 30, 1938, but before the certificate:

> At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 14th day of March, 1939. This proceeding coming on for further consideration: It appearing that a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necesssity to applicant's predecessor in interest upon compliance with the terms of said order; that the purchase of the operations herein involved having been approved and authorized, as provided in Section 213 of the Motor Carrier Act, 1935; and that further consideration having been had:

and then they go down, I will skip, they have another "appearing" paragraph:

> It is ordered, that upon full compliance with the requirements of Sections 215, 216 and 217—which were tariff and formal matters—of the Motor Carrier Act, 1935, and the rules and regulations prescribed by the Commission thereunder, governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification set forth as appended on the reverse side hereof or attached hereto and made a part of this order.

And there appears no restriction, no reservation, no notation in that appendix.

Now, that is the evidence. There was a time, a consideration by the Commission, by Division 5 of this matter as recited in their Order, and now they say this was a clerical inadvertence. If that is the case, if you can have a clerical inadvertence after such an order, there isn't an order of the Interstate Commerce Commission that has any validity any time. They could always claim "we did not intend to do what we did."

Now, when you have positive, uncontradicted evidence to the contrary it is the universal rule that you cannot infer anything contrary to that positive evidence, and that is what they have done here. Now, it is true, as I said before, it is discussed in here, thus the error if it be an error, occurred first in the compliance order, but they do not find that that was the document issued inadvertently, they go on and say the certificate was issued inadvertently. If they attempt to say that the compliance order was the inadvertent document they are right back

to the spot where they only have the omission and they have got facts which give equal support to two inconsistent inferences, and they have a hard time saying a document headed "At a Session of the Interstate Commerce Commission—It coming on for further consideration", that that is a clerical inadvertence.

Judge Van Oosterhout: Mr. Grinnell, it is 12:30, perhaps we should take a recess for lunch.

Mr. Grinnell: I have about two sentences.

Judge Van Oosterhout: Well, two sentences will be all right.

Mr. Grinnell: We intend, of course, to raise a question in connection with the Bennett case. It is an evidence question. We do not think there is any evidence to support what they did with the Bennett certificate. We intend to raise the due process question. In our brief we will take up our objection to their offer of evidence here, but those are the points. They did not have the power; they did it to put into effect a change in policy, and there was no evidence to support their basic finding.

Thank you.

Judge Van Oosterhout: At this time we will recess until 2 o'clock this afternoon.

(Whereupon, at 12:31 o'clock p. m., a recess was taken until 2:00 o'clock p. m. of the same day.)

Afternoon Session.

2:00 o'clock P. M.

Judge Van Oosterhout: Counsel for the Government.

Mr. Fitzgerald: Your Honors, I would like to open this discussion, if I may.

It seems to me in view of the discussions we have had on the admissibility of certain evidence here that various positions have sort of been presented to the court in a hands and feet fashion, and I would like if I may to lay

legal and factual issues before you in a straight-up fashion in order that you can more easily realize the legal conclusions which are proper in this case.

Now, Mr. Grinnell has pointed out that there are two orders before the court here, the order of December 7, 1953 which ordered the outstanding certificates cancelled and new or amended certificates issued which would contain a reservation of power and also the imposition of certain conditions to carry out that reservation, to assure that the operations would be auxiliary and supplementary of the train service. Particularly the Commission was interested in having the certificates conform to the findings which were made in the finance proceedings which are at the basis of this whole case because it is only through the approval granted by the Commission in the finance proceedings that these operating authorities were given to the plaintiff at all. They were given to the plaintiff on the conditions set forth by the Commission in those finance proceedings.

The plaintiff, as I suppose all know, is a wholly-owned subsidiary of the St. Louis-San Francisco Railway. It was incorporated in October, 1937 with the permission of this court, Judge Moore signed the order to allow it to perform coordinated rail-motor operations between points on the railroad. Most of the routes that it subsequently purchased parallel lines of the railroad although there is a good portion that does not.

The mileage involved in this proceeding is approximately 275 miles. It is represented by five certificates which the court has had described to it several times this morning. They represent subs 1, 3, 5, 6 and 10. These certificates, as I stated before, were issued as a result of finance proceedings had before the Commission. The certificates issued in Subs Nos. 1 and 3 were the result of finance reports issued in November, 1938, and 5 and 6 were the result of finance reports issued in 1939, and Sub 10 was the result of finance report issued in 1940.

Now, when the plaintiff came in to purchase these independent motor operating authorities it requested independent, all-out independent motor authority but its primary case was based on the need of auxiliary motor service in order to improve its less than carload train service and consequently by affording a faster and cheaper train transportation for less carload lots, thus benefit the public. The Commission in each of these finance proceedings refused to grant the plaintiff independent motor operating authority through the purchase of these certificates. It did say, we will allow you to purchase the certificates with the understanding that such operating authority is to be used only for auxiliary and supplementary rail service. Now, this is important: with respect to no one of the finance reports and subsequent orders did the plaintiff take any exception, nor did it make any attempt to have the limited authority as there granted expanded.

Judge Van Oosterhout: Was that clearly shown in those orders, that is, that it is limited, that is its application was denied for general motor transportation service?

Mr. Fitzgerald: Yes, Your Honor.

Judge Van Oosterhout: And their service is limited to auxiliary service? I have not seen the order.

Mr. Fitzgerald: I understand that, Your Honor, the reports are most specific in that regard and the implementing orders refer to an allowance of the purchase in accordance with the findings in the report.

Compliance orders were issued, as I said before, in the case of subs 1 and 3 in March, 1939 without any reference being made to the restrictive proviso set out in the finance reports and referred to in the finance orders. In June and July, 1939 there were compliance orders with respect to subs 5 and 6 which also fail to include the restrictive proviso. With respect to sub No. 10 there was no compliance order.

Three months after the finance report approving the purchase for auxiliary and supplementary service a certificate

was issued including the restrictive language allowing the Commission to impose such further limitations, modifications or restrictions as would be necessary to render the service auxiliary and supplementary of the rail service.

Mr. Grinnell in his remarks adverted to the fact that the Commission in its report stated that only the certificates were inadvertently issued. I think it is clear from the report that the original error occurred in the issuance of the compliance orders and that when the certificates in subs 1, 3, 5 and 6 were issued three years later all that was done was to perpetuate the errors that existed in the compliance orders which created the original error.

In the printed copy of the Commission's report in this case which Your Honors have before you, on pages 374 and 375, the Commission states: "The compliance order issued in each of the five proceedings sets forth the operating rights which the Transportation Company had been authorized to purchase, and in each instance omitted the limitation. In other words, each of the compliance orders and of necessity the certificates based thereon authorized operations greater than those for the performance of which the division authorized the purchase."

Now, it seems to me that when the plaintiff, who we must recognize as a cautious business corporation applied for certain motor operating authorities and was told by the Commission that it would be given them on a restrictive basis, and then three or four months later had issued a compliance order which failed to include these restrictions, that it would before expending any large sums of money and entering upon an independent motor operating program, have gone to the Commission and said, is this an error or have you decided to give us broad authority. That was not followed. They took the unrestricted compliance orders, in fact before the compliance orders they started independent motor operating authority as indicated in their complaint as soon as the finance proceedings were approved.

Now, I do not think that the equities in these situations place the plaintiff in a very pleasant position because moving on from its actions after getting the unrestricted compliance orders, complaints were filed with the Commission in 1941 that the plaintiff was allegedly violating the rules, orders and regulations of the Commission because it was performing independent motor carrier authority. As a result of that, the Commission began an investigation in a case known as the Campbell "66" case. It came to the conclusion that the plaintiff under these operating authorities in issue here was exceeding the authority which the Commission intended to grant. However, no order was entered in that case because it was intended to reopen the certificate proceedings and they thought that any implementation of findings in accordance with their order or otherwise could probably take place in the reopened proceedings.

The Campbell "66" case was reviewed by the full Commission who held that the only question on this investigation is, has the plaintiff committed any wrong by violating its authority under the certificates. Since the certificates on their face are unrestricted they do not, and we can't hold that they have violated any rules or orders of the Commission. However, it said the plaintiff is not to construe our action in this case as meaning that we will not now go back and see what kind of authority they should have gotten as represented by these certificates, and they referred the matter, the determination of that point to the certificate proceedings which had already been reopened. The certificate proceedings were reopened on January 4, 1945 by reason of an order of Division 5 of the Commission which said that these proceedings are to be reopened for the purpose of determining the scope of the certificates on the record already made. Now, that record consisted first of the applications to purchase these operating authorities, of the transcript of testimony on the hearing of these applications, of the reports including

the findings and evidence therein in the finance reports as a result of these applications on the official dockets of the Interstate Commerce Commission which were open to the public. Certainly they ought to be able to find out what the proceedings before the Commission were. They were not secret. I found these memoranda and they could have found them just as easily.

As a result of the reopened proceedings it was decided by the Commission that there would be a proposed Examiner's report based on the existing record. That report was issued. Exceptions were filed to that report, and then orders of April 28, 1945 and March 8th, 1946, which further reopened the proceeding and set it down for a further hearing. That hearing was held on April 8 and 9, 1946. There were exceptions filed to the Examiner's report. There were two Examiners that issued a report there—to that report, joint report. There was then a report issued by the Commission which agreed in part with the Examiners' report, practically substantially with the Examiners' report, that the certificates had been inadvertently issued, that they should be amended to include the reservation of a right to impose limitations and restrictions to require auxiliary and supplementary service, and that they should also include the five specific conditions which the Commission agreed with in its report which appears in appendix B of the report. Thereafter the Commission granted oral argument on exceptions to Division 5 report. It issued the order of December 7, 1953. A petition of reconsideration and rehearing was addressed to the Commission and it was denied on April 4, 1955, which is the second order that the plaintiffs are seeking to have this court set aside and annul.

Now, since there is no claim here that the Commission has acted pursuant to Section 212 (a) of the Interstate Commerce Act, which is the section providing for revocation of a certificate because of willful action on the part of a certificate holder, the pivotal question is whether the

Commission has the power to restrict these certificates in the fashion it has, and if so, whether it has properly exercised that authority. Fortunately we have a lot of expressions of the Supreme Court which can help us in the solution of this problem. I refer particularly to the opinion in the United States v. Rock Island, which I shall hereafter refer to.

Judge Van Oosterhout: I presume you plan to file subsequently a written brief wherein all those citations will be given?

Mr. Fitzgerald: Your Honor, I propose to file a brief as soon as I am finished arguing.

Judge Van Oosterhout: My only point in inquiring is if you or counsel cite a case that is not in your brief we would like to have it called to our attention so we can make a notation. Unless it is so referred to we will assume it will be in your brief and won't make a notation.

Mr. Fitzgerald: Thank you for the suggestion, Your Honor. I will remember that.

I have no objection to Mr. Grinnell imputing to himself an understanding of the Rock Island case. Of course, I object to his stating that we do not understand what it is about, but inasmuch as it supports our case I guess we can pardon the characterization he gave to the case.

In the Rock Island case the Supreme Court was concerned with limiting motor carrier operations. There were two purchases in that case. There was what was known as the White purchase and Frederickson purchase. The White purchase involved a certificate that contained limitations to impose any further restrictions or modifications necessary to render the services auxiliary or supplementary of the train service. In that case it is exactly like the Bennett certificate sub 10 here, and is on all fours, and obviously the Bennett certificate under the Rock Island is subject to the imposition of the five conditions contained in Appendix B of the report.

In the Frederickson purchase which was also involved,

there were no restrictions in certificates that were purchased and there was merely a finance order approving the purchase and in general statutory language, not as specific as the language we have here in the various provisions in the finance proceedings. That said that with respect to the Frederickson purchase the Commission still had power to impose conditions even though there were not any specific limitations indicated. Now, what is important in the recitation of that case is that the court also pointed out that the Commission can limit the motor carrier authority of a railroad, motor affiliate at the time it approves the application and it also pointed out in this connection that it has been the Commission's practice to restrict such authority when granted to railroads in order that they may operate these motor carrier affiliates.

The Commission specifically found that so restricting the motor carrier affiliate is a logical method of enforcing the National Transportation Policy, which also brings in an important point here that the Commission, when it is imposing these restrictions and requiring certain conditions to be fulfilled in the operation of the authority is not enforcing solely a Commission policy, it is enforcing the policy of the Congress of the United States which in the National Transportation Policy has said it is necessary that we maintain competition, that we preserve the inherent advantages of all modes of transportation and through the development of these various modes of transportation present to the country an efficient and economical transportation system.

The Supreme Court has also pointed out in the Rock Island case that railroads are in effect forbidden to acquire motor carrier affiliates except to enable the railroad to use the motor vehicle service to implement its own operations and not to perform independent motor operations so that it is in competition with independent motor carriers throughout its area. Now, it is true that the Rock Island case discloses hesitancy about three cases where they

might have some doubt as to whether conditions could be imposed. It said you cannot imply a continuing power in the Commission to change conditions upon which the parent railroad has already acted and relied. It also said that a reservation of a right only permitted changes connected with coordinated plan of operation and it left unanswered the question as to what it would do where there was no proper plan of operation and where there was no restriction in the certificate.

Judge Van Oosterhout: Haven't they reserved it specifically in these three cases that we have here outside of the Bennett case?

Mr. Fitzgerald: I would answer that in the negative, Your Honor.

Judge Van Oosterhout: Is there something to the effect that they would meet that problem when it arose?

Mr. Fitzgerald: I think, Your Honor, that they were there referring to a situation where there was no indication that any limitations were to be imposed either in the certificate or in any prior coordinated plan.

Now, I think that when in the finance proceedings they said, we are approving this authority only for this particular specific restricted purpose, that they were there spelling out a coordinated plan which put the company on notice.

Now, as I stated before, despite the restricted nature of the original authorizations the plaintiff undertook independent motor operations, and it did this even after it received certificate, continued to do it even after it had received certificate Sub. No. 10 which contained limitations based on the same kind of finance approval as their other ones. Still, this company made no effort to go back to the Commission and find out whether they had been granted unrestricted authority in other cases. That I cannot understand, because if the Commission did not intend to give them unrestricted authority they would be saving themselves all this trouble, and if it did intend to give

them unrestricted authority it would have told them so, and they would have obviated all this trouble. They did neither, and they certainly did not act as careful independent business enterprises are expected to act, and I would feel they would have no equities whatsoever.

Judge Van Oosterhout: That does not comment on the primary point that you spoke of as to whether the Commission has the power to do what it has done, and answering that it is a question of law one way or the other.

Mr. Fitzgerald: That is right, Your Honor. I bring the equities up because they have in a sense——

Judge Van Oosterhout: Yes, in the constitutional due process issue.

Mr. Fitzgerald: Yes, sir.

Now, proceeding from the abstract question as to whether the Commission has the power to do what it did in this case and whether it properly exercised it, I think that there is a certain inherent value in the findings in the finance proceedings which necessarily determine the extent of the authority that can be granted. As I said before, they put the plaintiff on notice and they also revealed a plan of coordinated operation which has been recognized in the Rock Island case as a basis for exercising future restrictive authority. The Commission itself in its report has determined that those findings were conclusive. It says that the authority could be no greater than the findings in the finance proceedings.

Judge Van Oosterhout: What do you say about—I don't care whether you answer it now, either you or Mr. Johns, or someone, about reconciling the Watson decision that was referred to by the Supreme Court with the situation here?

Mr. Fitzgerald: Well, Your Honor, I can make several distinctions there. Excuse me just a moment.

Judge Van Oosterhout: Maybe you prefer to refer to it later.

Mr. Fitzgerald: I was going to refer to it later, anyway.

In the first place, the Watson case was an application for a certificate of public convenience and necessity under 207. All of these purchases were applications under Section 5 (2) (b) of the Interstate Commerce Act, which is very restrictive with respect to what mode of carrier affiliates railroads are allowed.

Judge Van Oosterhout: But Judge Johnson in his dissenting opinion raises many of the same arguments that you do here.

Mr. Fitzgerald: I think they are very persuasive, Your Honor.

They also held in that case that there was no correction of a clerical error; that in a sense they held it was the same as the Seatrain case where there was an unrestricted grant of authority. I might also, since I mentioned the Seatrain case and since Mr. Grinnell has relied on it over such a long period of his argument, point out that in the Seatrain case the Commission tried to do what the Supreme Court said they could not do in the Rock Island case, and that is to impose a different set of conditions where the carrier was already relying on other conditions. In the Seatrain case the Commission's restrictive order attempted to establish a new policy as a result of a recent decision that it issued. Here the Commission by its restrictions is insisting on maintaining its old policy, the same policy it had since 1936 when the Parker case came out and recognized, and still was in existence in 1950 in the Rock Island case.

Judge Van Oosterhout: Doesn't it strike you as being unusual that in five out of six of these instances inadvertence would creep in and there was an error in expressing the intention if it was not more or less the uniform practice of handling it that way?

Mr. Fitzgerald: Your Honor, the unusual aspect of that situation is beyond denial. I think perhaps that Mr. Johns, having grown up in the Interstate Commerce Commission, could perhaps offer some explanation of how that occurred

and I, of course, think it was inadvertence, and I think that the certificates indicate that because the people who issued these compliance orders and issued these certificates were ministerial subordinates of the Commission who had absolutely no authority to make any decisions which would affect what had already been done by the Commission or a division of the Commission. They were instructed to fill in forms according to certain findings. They had no right to change those findings and, in fact, I do not see, since all these finance proceedings were adversary proceedings how the Commission could possibly make such a radical change in all of them without giving notice to the people who had opposed these applications and who apparently were satisfied with the decisions the Commission rendered when it approved the purchases.

I was about to refer, or we were talking about the Watson case as I pointed out. First of all, it involved a 207 certificate; secondly, it held that there was no correction of a clerical error; third, it held that what was attempted to be done could not have been done without a hearing anyway. It specifically underscored the fact that there had been no hearing in this case, and with respect to the affirmance by the Supreme Court, I think we all understand when the Supreme Court grants a motion to affirm these cases it is not adopting an opinion of the lower court, it is merely saying, "We are not going to consider this."

Now, interestingly enough, in the Supreme Court in the Watson case the brief of the Solicitor General of the United States and the General Counsel of the Interstate Commerce Commission stated that the question presented was whether the Interstate Commerce Commission, having inadvertently issued a certificate to a motor carrier granting operating rights in excess of those which the Commission found to be required by public convenience and necessity, may without notice and hearing correct the certificate. There is no substantial question there. No wonder the Supreme Court did not act on it. Could they correct it

without giving a hearing? Of course, that is not this case for several reasons. They had extensive hearing here, they had notice for a long while what the scope of the hearing was going to be.

I am interested in emphasizing to the Court the restrictive nature of purchase that was permitted under 5 (2) (b) of the Interstate Commerce Act. The court in the Rock Island case stated the consolidation section, Section 5 (2) permits a railroad to purchase a motor carrier only "with approval and authorization of the Commission." That approval is contingent upon a finding of public convenience and lack of undue restraint upon competition. Then approval is to be made "upon the terms and conditions and with the modifications so found to be just and reasonable." In the instant case the Commission found that the acquisition of these motor carrier operating authorities by plaintiff would be in the public interest only if it was used in a fashion that would produce auxiliary and supplementary service for the railroad, and it would seem to me that any certificates which are broader than the scope of the public interest findings which the Commission made in these cases would certainly seem to lack legal validity.

I have referred in that connection, in that same connection, to the Callanan Road Improvement Company case, against the United States, where the court there indicated it felt that the findings which preceded the granting of an authority would control the extent of the authority granted, and while the Supreme Court in that case affirmed on another ground, it made the significant statement that there was no finding that his operations included the towing of barges which he did not own, rent or charter, was a question there as to whether a purchaser, a successor or a purchaser to a grandfather authority had the right to a freightage as well as towing, and held he did not, and the lower court had said even under the principle of the Seatrain case it would seem that the Commission might act in any event to correct a certificate having the obvious

makeup of the Hutton certificate which nevertheless was based on a finding of limited grandfather rights. But we are clear that in any event this can be done where the carrier has consented or waived objection.

In that connection I again want to return to the statement that this plaintiff made no objection, took no exceptions to the findings in the finance proceedings.

It is also felt that the restrictive nature of the plaintiff's authority is further emphasized, and this brings up the Watson case again, between the contrasting purposes, between Sections 5 (2) (b) and 207. As I have said, 207 is concerned with the railroad seeking new or additional motor carrier service which is required by public convenience and necessity, and in the case of 5 (2) (b) both the statute and the Commission practice sanction the issuance of authority only for auxiliary and supplementary rail service in the absence of unusual conditions because there have been cases where on proof of unusual conditions, we have them right here, Sub. No. 2 was not modified because the Commission found that it involves a very short route in an isolated area where there is not any other transportation, and in addition they have the authority in the reverse direction, the unrestricted authority, so that was the basis for the Commission not proposing restrictions in Sub. No. 2 in this case, and apparently a similar application is in order with respect to eliminating Dyess, which is a small hamlet some seven miles off the road, but as I understand the plaintiffs are not anxious that the Commission include Sub. No. 2 under the restrictions or also include Dyess, so I guess we are all agreed on that.

I now want to come to a discussion of the evidence concerning inadvertence, and evidence that the authority granted exceeded the findings in the finance reports and evidence with respect to the specific restrictions imposed in Sub. No. 10.

Your Honors may recall that in their complaint in paragraph 17 (a) the plaintiff maintained that there was no

evidence to justify any finding of inadvertence and that the old certificate should be cancelled and new or amended certificates issued in their place, and in 17 (b), that there was no evidence justifying the restrictions imposed in Sub. No. 10. I think we can dispose of Sub. No. 10 finally now because it is exactly on all fours with the White purchase certificate in the Rock Island case. The restriction was in the certificate, and those restrictions as I will later call to the Court's attention are similar to the restrictions in the Rock Island case.

Judge Van Oosterhout: Of course, it was 5 to 4 decision, the Rock Island decision.

Mr. Fitzgerald: I guess the four didn't count, Your Honor.

Judge Van Oosterhout: One on each side has passed down, so what the Supreme Court would do when they look at it again would be hard to tell.

Mr. Fitzgerald: They tell me Mr. Justice Clark, the late Justice Clark in the Court of Appeals for the District of Columbia, used to say that a dissenting opinion is about as good as the second best hand in a poker game.

Now, it is significant and interesting, too, that the plaintiff has stated that there was no evidence to substantiate the inadvertent issuance of the certificate because to me it indicates he recognizes if you could prove inadvertence you would be able to recall the certificate and issue new ones. In fact, in the argument before the Commission in November, 1952, Mr. Baumann and Mr. McCullough made a presentation on behalf of the plaintiff and the former, Mr. Baumann, stated at page 275——

Judge Moore: Who?

Mr. Fitzgerald: Mr. Baumann, who was then one of the attorneys for the plaintiff, he stated at page 275 of the transcript, at the time of the argument before the Commission, that the question of inadvertence was raised by Commissioner Knudson, "And I think it is one of the im-

portant parts of this case, because as a matter of law, anybody must concede that a certificate inadvertently issued can be changed"; and at page 346 of the transcript, Mr. McCullough expressed himself thus:

> "If there were error in the issuance of the certificate, regardless of how it happened, I believe the Commission could at any time go back and correct the error, if there was evidence of an error."

Now, the Commission itself, of course, feels it possesses the power to correct inadvertently issued certificates, and these cases are in the brief, Your Honor. I have mentioned three of them, Gray extension-general commodities, 52 motor carrier cases; Petroleum Carrier Corporation, 51 motor carrier cases; Santa Fe Trail Transportation Company, New Mexico points, 46 motor carrier cases; and this basis for the Commission action has also been recognized by the court in Riss and Company, 100 Fed. Supp. affirmed 342 U. S., rehearing denied, in a subsequent report when it stated that the Commission can correct its errors if there were errors, but the Commission must determine whether these errors exist.

Now, in the Seatrain case where the Supreme Court decided that there was no inadvertence, the court pointed out sources of information to which it looked to determine whether there was any inadvertence. It looked at the Seatrain's applications, at the information that was supplied to the Commission, and at prior decisions of the Commission, and I think that we can with profit follow the same sources of information in deciding here whether or not the Commission inadvertently issued the certificates. I have already referred to the applications in the finance proceedings and to what the findings were in those finance proceedings.

Now, it is noteworthy that the plaintiffs have not had certified to this court the transcript in the finance proceedings indicating what authority they were seeking.

There is no need for us to certify it because the Commission reports substantiate our position on those findings.

Taking a look now at the finance proceedings, in MC-F-618, which was the finance proceedings covering Sub. No. 1, Division 5 found that, "The authority herein sought is desired to afford applicant and the railway means for developing coordinated rail and truck service, with a view to retrieving some of the substantial volume of less than carload freight diverted from the railway to competing highway carriers": and later on they find that the purchases by the plaintiff will be in the public interest provided it accepts this authority to perform auxiliary and supplementary service for the railroad. In each one of these finance proceedings the division, referring to the applications, found the objective was mainly to obtain the ability to perform a coordinated rail-motor service, and in each one of them it agreed that the purchase was being granted for that purpose and only for that purpose.

Now, in the reopened certificate proceedings, Division 5, commented on all these facts as to what the applications were for as to what determination the division came to in the finance proceedings, and at one part it stated, of its report in each of these applications, the transportation company again stated that the purpose of the proposed purchases was to enable it to establish a truck service coordinated with the train service of the railroad, and to make direct connection with the freight trains of the railroad, thereby making rail-motor service mutually beneficial. In support of its claim of consistency with the public interest the two applications, referring to 5 and 6, like the preceding ones expressly relied upon the benefits which it was alleged would flow from rail-motor coordinated service.

The division in summing up its case reiterated the same thing. In each proceeding the plaintiff built its case primarily on the railroad need for auxiliary service, and in each case the Commission, Division 5, following then well

established precedents, approved the proposed acquisition only to enable the company to perform auxiliary service. In each case the finding that the purchases would be consistent with the public interest was clearly predicated upon a showing it would be only if it assisted the railroad in its railroad operations.

Now, Mr. Johns produced some evidence here today, brought before the court these letters of Mr. English and Mr. Dalton, letter of December 17, 1938, in which they agreed to accept the authority represented by Subs 1 and 3 upon the conditions in the finance reports, and a letter of March 6, 1938, where they made a similar admission with respect to Subs 5 and 6. I was going to refer in my argument to what Mr. Johns has already brought to Your Honor's attention, that following the termination of the finance proceedings the docket in each one of these cases, which is a public docket indicated that memoranda was sent from the Section of Finance to the Section of Certificates with respect to these particular operating authorities, in which the former called the attention of the latter to the fact that in drawing the certificates, "Please pay attention to this restrictive language". Now, there is the evidence before the court, before the plaintiff, before everybody. It is an official docket. The plaintiff produced no evidence on this hearing or at any time that there was no inadvertent issuance of the certificate. It said, "You could not have intended to be inadvertent, you must have intended to give us unrestricted authority". That is all there is to it. But why? Why could not there have been an error? We have the docket sheet that there was an error. We have the finance proceedings indicating the Commission could never in these particular cases have granted unrestricted authority. It ran contrary to the finding of public interest, the only justification for approving the purchases whatsoever. Of course, as I say, the compliance orders which followed the finance proceedings within a couple months made no mention of the re-

striction and it was three years before the certificates ever came out and, of course, the certificates were drawn from the compliance orders.

In 17 (b) of its complaint, the plaintiff refers to the substantiality of the evidence to cancel the certificates so that new ones will be in conformity with the finance proceedings and with respect to the imposition of conditions. Now, I think if they are referring to the evidence whether the Commission had any right to act in this case, I have already answered that. If they are objecting to the evidence as to why these conditions, why the best evidence is that they are conducting independent motor operations, and the court in the Rock Island case has said if motor operations are being conducted then these types of conditions should be imposed in order to make the activities of the motor carrier affiliate of the railroad conform to the authority that it has been given; and besides it is not only a factual question whether the Commission can take the restrictive action which it has taken in this case.

Judge Van Oosterhout: Each side has now used about forty-five minutes. The Court wants to be considerate and give everyone an opportunity, but we would like, if possible, to conclude the argument today and have the case submitted subject to written briefs, and we would rather have that in view of the fact that most parties are desiring to file written briefs anyway, that the argument could be shortened to some extent. So that we can schedule matters to complete this afternoon, I would like to ask about how much time Mr. Johns and the intervenors desire to use. You can discuss the matter among yourselves a moment, if you want to.

Mr. Johns: Well, we already have, Your Honor. Personally I do not propose to take over fifteen minutes, if that long; and I think the intervenors here will probably not take over a half hour altogether.

Judge Van Oosterhout: Will a half hour altogether for the intervenors be satisfactory?

Mr. LaTourette: I think so, Your Honor. It may develop as we hear the argument of the Government, we might think they have answered all the questions.

Judge Van Oosterhout: That is what struck me. The ground is common. How much more time do you think you need, Mr. Fitzgerald?

Mr. Fitzgerald: Oh, I think I will conclude in the next ten minutes.

Judge Van Oosterhout: How much time do you folks think you should have in rebuttal?

Mr. Grinnell: I do not think I will need more than fifteen minutes.

Judge Van Oosterhout: Well, let's see if we can't hold it down to a maximum of an hour from now for the defendants and intervenors.

Mr. LaTourette: I think that can be done.

Judge Van Oosterhout: All right. Pardon me.

Mr. Fitzgerald: Well, I think I can shorten mine considerably, Your Honor. I was going to discuss the conditions, but I think the brief sets that out well enough, the argument, there is no need burdening you with it.

Judge Van Oosterhout: Well, if everything is in the briefs it is more a matter of emphasizing the high points.

Mr. Fitzgerald: I will just conclude with respect to the general objections that the plaintiff has made. The plaintiff has claimed that the Commission's action here violates the Interstate Commerce Act, specifically Section 206 and Section 216, and that it violates the administrative procedure act, does not afford due process and otherwise is unlawful, arbitrary and unreasonable and that there has been faulty procedure and inadequate notice in opening these proceedings. I think that all of these objections are without foundation in light of the record.

With respect to the alleged violation of Section 206, the plaintiff there has reference to the fact when you buy

grandfather rights you are supposed to get the future operation, substantial parity with the operations performed in the past. The Rock Island case has held that that does not necessarily follow where a railroad buys a motor carrier.

Section 216 is alleged to have been violated because this action of the Commission is said to deprive the plaintiff of the ability to fashion through routes and joint rates. The Rock Island case has held that with respect to 216 those general provisions do not override the specific requirements of the National Transportation Policy which is insistent upon maintaining competition between all modes of transportation and preserving inherent advantages of each and preventing rail domination of any particular mode. The Rock Island case has specifically said that this type of restrictive action by the Commission does not violate the National Transportation Policy, and the McLean Trucking case and the Parker case in the Supreme Court, and the Rock Island case in combination make it clear that it is the obligation of the Commission based on its expert judgment in transportation matters to decide what is necessary to uphold the transportation policy and what is liable to be detrimental to it.

With respect to the power to reopen these certificates, hardly anyone can deny that the Commission has continuing jurisdiction over matters of this kind. The Rock Island case and United States against Texas and Pacific, which was a companion case with the Rock Island case, both imply the Commission has power to reopen cases of this kind.

Now, as to whether the plaintiff got insufficient notice of what was going on here, we can go all the way back to 1941 when the motor carriers came in to the Commission and said, "Look what they are doing, they do not have authority to do all this, they are acting as independent motor carriers". The Commission had an investigation, came up with the findings that, "You do not have author-

ity to do this". The Commission said, "We are not going to penalize you because of the face of your certificate. You haven't violated anything but that does not mean we can't look into these and change them around so you got restricted authority". There was an Examiner's report which indicated that the purpose was to determine whether or not the certificates should be revoked and new certificates issued. There was a further Examiner's report and there were exceptions. There was a division 5 report, oral argument before the Commission, and that is over a period of years. In fact, the attorney for plaintiff in the hearing on April 9th said, "We do not want to go into the question of inadvertence. There is no inadvertence. You can't recall our certificates on that basis", so he knew what the purpose of the proceeding was. Now, just because the plaintiff failed to anticipate the grounds of the Commission's decision or did not take the necessary steps to protect itself is no basis for claiming it has been deprived of due process. The Supreme Court has held the surprise in itself is not necessarily a lack of due process, in the Market Street Railroad against Commission, 324 U. S. 548.

They also claim that this is taking away their property. The Rock Island case held if these restrictions are being properly imposed no property is being taken away. There was a lot of property actually being taken away in money value, but the Supreme Court held no property was being taken away because you are not being deprived of anything you should have had, you are not losing anything, you should not have had it in the first place. In fact, I think they are very lucky. They have been able to operate for fifteen years the way they have, so if they are ultimately restricted they are being placed back in status quo where the Commission originally intended them to be.

Besides that, with respect to the losses they allege, they allege losses based on system figures. This is only 275 out of some 3500 miles. Those figures do not represent

what they are going to lose. It is not true they are going to lose all their business if restricted to auxiliary and supplementary service. They will certainly lose a portion of it.

I do not think in view of what I have said with respect to the notice plaintiff had of the scope of the proceedings, the opportunity to present evidence, the argument it has made, evidence before the Commission, findings by the Commission, that there can be any question that the administrative procedure act has been complied with and that there is right here now before this court enough to permit it to perform the limited task which it has in cases of this kind.

Mr. Johns: May it please the Court.

Judge Van Oosterhout: Mr. Johns.

Mr. Johns: It is our view here, as you have probably gathered from Mr. Fitzgerald, that the Rock Island case answers practically every question raised by these plaintiffs. I say practically every question. I think that it does specifically answer every question except this one on inadvertence and it is my argument here that it even answers that question.

Now, let's take the Frederickson purchase.

Judge Van Oosterhout: Is this the one where the certificate had not yet been issued?

Mr. Johns: Yes sir.

There had been a hearing. The Commission had not mentioned in its report and order anything about restricting the rights. There was no proviso in the report and order and that was the status of the case when it got to the Supreme Court, and when Mr. Justice Reed got to this particular case he said well, this has been I think eight years, the railroad had been operating eight years, he said, "Well, we will answer the question this way: we will say that the certificate terminates the proceeding and until that is done the Commission can do what it pleases with these motor carrier affiliate-railroad affiliate operations";

and then he got to thinking, what would I do here if a compliance order had been issued without a proviso in it and the certificate had been issued without a proviso in it, and then he made the specific statement to which Your Honor referred, that we leave that question.

Now, I say that he indicates there that that is the type of situation which had given the Supreme Court trouble. Where the Commission had never mentioned anything about restrictions, a compliance order had issued, no mention; a certificate, no mention, what would the Supreme Court do then, would it allow us to go back and change it, and he said, "Well, we better wait until we get a particular record and see the facts in the case." Now, I imply from that, infer from that that he would have no trouble with anything short of that type of proceeding. In other words, if the Commission had ever indicated in any way that it intended to restrict a particular operation that the Supreme Court would have no trouble with giving us, with saying that we have the power now to go back and put in these restrictions.

Judge Van Oosterhout: On the basis he decided the specific case on, the one you mentioned, until a certificate was issued they would have full jurisdiction, so apparently anything beyond that you might say was reserved for further interpretation?

Mr. Johns: Yes, sir, but he does state it so, and it is all in connection with the Frederickson purchase, and in the same paragraph with the discussion of the Frederickson purchase it is clear what he had in mind, what would he do with it then. He said, "We don't know, we will reserve that question." So I say that is not this case, and the inference from what he said there was that we have the power in a case like this.

Now, let's get back to this question of did it occur and how it occurred. The Commission, at least the division states in its report the administrative handling of these matters among the staff of the Commission, and as I say

these exhibits which we have introduced are from the public documents, illustrate that handling; in other words, after the section of finance wrote a report and got it okayed by the division, a copy of that report was sent to the section of certificates. The Section of Certificates was supposed to issue a compliance order or certificate. If you had compliance orders in the beginning ordinarily in many cases, if you had a certificate in the beginning you would get a certificate for the new operation. If you had a compliance order then you got a compliance order, but those boys there draw these, and I say as Mr. Fitzgerald says—I have had some experience, I went there in 1941, that was ont of the first jobs I ever had, and to give you something official to go on in the Crescent case, which is reported in 320 U. S., the Supreme Court commented on the tremendous number of applications the Commission had to handle back in the early motor carrier cases, the pressure it was under and how informally we handled those matters. Now, with 80 or 90 thousand applications for motor carrier rights and a few isolated cases coming through for rail affiliated motor carrier rights, I think you can readily see how some man would slip up and fail to include the proviso in the compliance order. In other words, we say that the Bennett method of handling the paper work was correct, the proviso appears there. It does not in these others.

Now, there were other compliance orders issued I think on different dates. Well, two of them were issued just about the same time but they were probably handled by the same man. They were issued in March, June, and July, 1939, and there was a difference in the handling, a different man handled them, a different man made the same error, but we say that it does occur even at this day and time it occurs.

To give you a very good example of another inadvertence that appears on this record and about which no point is made, these certificates which were issued beginning in

1942 were inadvertently issued for another reason. The Campbell "66" case was pending then, a complaint against the railroads operation, and under our administrative handling the certificates were not supposed to issue so long as there was a complaint against an operation, and yet they issued them; and that is another point that has not been brought out here but it is another error. They happen in handling the volume of work. It is something that you can't prevent because we are mortals, and if you say that this is not an inadvertent error then you are holding us to perfection, and we say that we do not have that kind of manpower, we are not perfect.

Now, so much for the administrative handling of it. We think that the legislative policy which commands the Commission to preserve the inherent nature of each mode of transportation coupled with the condition in Section 5 (2) (b) which says we must make a particular finding that the rail may use that type of transportation in its operations together with what has been said in the Rock Island case about the history of these operations clearly shows that any certificate issued without some specific comment that this is an unusual case clearly shows inadvertence. Well, that is our argument on the law.

Judge Van Oosterhout: According to paragraph 11 of the petition apparently these certificates were consolidated in 1943 and a couple of them in 1948. Is that the certificates that were originally issued, are they effective until they are revoked?

Mr. Johns: Yes, sir, until changed, yes, sir.

Judge Van Oosterhout: Then the only purpose of a consolidation is probably to lighten the paper work?

Mr. Johns: Precisely. For example, let me say this, there were not five certificates issued in these cases. The first certificate was a consolidated certificate in July, 1942-March, 1942, and it contained a group of certificates. I do not know that it contained all five, so you do not have five separately issued certificates. We say the error was

made in the issuance of the compliance order and naturally a man making the certificate just copied the compliance order, so that is how that follows through the certificate.

But now let's, for a moment forget inadvertence. Let's suppose that the Commission did this deliberately, purposely. Where does that leave us? The courts over the years have told us that when we take official action that we must state reasons for that action, that the reasons must show a rational basis for that action. Now, under plaintiff's argument we can prepare a very fine report saying we are going to do this and this, right according to the statute, but when we come to issuance of the certificate we can say, "Well, we are going to ignore that and do it this way", and we make material changes in there without any reason for it and apparently there is nothing this court can do about it. Now, doesn't that follow from the plaintiff's argument? We must have reasons, we must have findings, and I say that those certificates are not worth the paper they are written on, because there is no finding showing why the Commission changed its mind. We have always said we have to give reasons, and I think we have to have a reason for a change as material as the one which occurred here. So that is the predicament we get in if we follow plaintiff's line of reasoning.

It also follows from that argument that you deny to the other parties to a proceeding like that due process because you told them in a report—and this is in all probability why the courts have held us to reason, to a rational basis—you told the other parties, "We are going to do it this way and put a restriction in it", and you go off to a side privately, in a sub 1 proceeding and issue them different authority. It never gives the other parties a chance to answer; it would deny the other parties due process. I say the argument is faulty from that standpoint.

We think clearly here that this record shows an inadvertence, and on the power to correct it, we say we have

the inherent power, that any power granted to the Commission is power to act purposely and that if we slip up we have the inherent power—I should say we do not have the power to act inadvertently, if we should slip up we have to correct it as the courts correct it, and the general rule is, of course, the courts may always correct clerical errors, and we think our power is very similar to that.

Judge Van Oosterhout: Of course, in a particular case, the Commission would have had power if the record justified it to issue an unrestricted certificate?

Mr. Johns: Now, we say yes; the ATA says no. We have a case in the Supreme Court today arguing that very point, that we may not grant an unrestricted certificate under any circumstances.

Judge Van Oosterhout: At least the Commission thinks they have the power to do that.

Mr. Johns: Yes, sir, in an unusual case.

Judge Van Oosterhout: So it would be, in other words, the type of certificate here would have been the type of certificate that would have been within the power of the Commission to issue; it is just a question whether the proper findings were made?

Mr. Johns: Proper findings were made. Yes, sir, if proper findings were made we think we could have issued the certificate. It would have to be based on evidence, of course, showing some good reason. I might mention to Your Honor in this very Rock Island case the Rock Island people have come back to us, and that is the certificate that we are fighting about in the Supreme Court. We have now issued or propose to issue to the Rock Island unrestricted certificates over two of its lines, and ATA and others are fighting us on that proposition. We say in exceptional cases we can do that.

I also want to invite Your Honor's attention to the dissenting opinion of Commissioner Alldridge. He would have put this power on a different basis from what the majority does. He says why worry about inadvertence.

Under Section 208A of the act we have power to change it, under 208A. Section 208A of the act provides at the time of issuance of the certificate or from time to time thereafter the Commission may insert such reasonable limitation and conditions as public convenience and necessity may require.

Judge Van Oosterhout: Is there any authority to support the Commissioner's position?

Mr. Johns: No, sir. As the Commission stated here a few years ago, it has never tried to delve into the extent of that power because you have to read it in connection with 212 (a), the revocation power. It is something short of revocation and yet it does give us power to change a certificate after it is issued and he thought we could do that in this particular case under 208 (a).

I think that is about all I have unless Your Honors have some questions. I do not want to talk all day here.

Thank you very much.

Mr. Beardsley: May it please the Court, I am going to be very brief. In view of what Mr. Johns said I do think it is important to set forth the way in which we do differ with the Commission, and if I might I would like briefly to refer to the statute as it was originally passed, namely, the Motor Carrier Act of 1935, and the predecessor section of Section 5 which was 213 of the Motor Carrier Act which had this to say with respect to purchase of operations by one carrier of another. After going into detail as to various procedural things, the statute read this way:

> If after such hearing the Commission finds that the transaction proposed will be consistent with the public interest and that the conditions of the section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purshase, lease, operating contract or acquisition of control upon such terms and conditions as it shall find to be just and reasonable and with such modifications it may prescribe.

Now, Congress was talking about acquisitions of one motor carrier by another motor carrier, and this is what it had to say when it talked about acquisition of a motor carrier by a rail carrier for an affiliate or subsidiary of the rail carrier. It said this, provided, however, that if a carrier other than a motor carrier applicant or any person which is controlled by such carrier other than motor carrier affiliate—therefore, within the meaning of Section 58 of Part 1 the Commission was not to enter such an order approving the purchase unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than motor carrier to use services by motor vehicle to public advantage in its operations, and will not unduly restrain competition.

Now, that has come to mean, as the Supreme Court pointed out in the Rock Island case, that the railroad must show that it intends to use this motor service not in competition with itself as a railroad and with independent motor carriers in over-the-road service, but in order to enable it, the railroad, to perform its rail operations more efficiently in the conduct of its day-to-day business.

Now, there is where we differ with the Commission unless perhaps Mr. Johns misspoke himself. We take the position that that language is jurisdictional. There is nothing in this statute which says except if the Commission shall find special circumstances which authorize, which will allow an exception. That language is not there. Congress had this thought in mind because the motor carriers, at the time the federal legislation was being contemplated by Congress, one of the great fears in our industry was that we would be swallowed up, if you please, by the much more financially capable railroads. We felt that we could not exist if the statute were so written as to enable the railroads to come in and purchase a motor carrier any time they wanted, or to obtain all-out motor operating authority any time they wanted. That is the reason this

language was placed in there, and Senator Wheeler and Congressman Sadowski, the gentlemen who headed the Senate and House Committees, both stated with this amendment in here the Commission would be able to allow coordinated service by a railroad but would not be enabled to allow the railroads to go out and expand their field and get into the motor carrier business.

When Mr. Johns referred to the Rock Island case, I would remind him the application was filed under Section 207 by the railroad and not under Section 5, as is the case here with the Frisco Railroad. I do not intend to speak for the Commission, perhaps their position is the same with respect to Section 5 as it is to Section 207 applications, but I did not understand that.

I completely agree with Mr. Johns' argument to the effect, if you buy the Frisco's argument here, you are saying, as I understand the argument, that they can decide completely outside the record that they are going to in effect overrule their formal printed decisions, and motor carriers who came in and protested these applications, and who were satisfied when the Commission, in the first instance, indicated that the authority to be ultimately granted would be so-called auxiliary and supplementary authority, have no basis, have no standing to protest when the Commission, through what amounts to secret instructions to their staff to pay no attention to the formal reports, issues a certificate which is entirely different than the formal reports indicated would be ultimately issued.

I wanted, if I may, briefly, just to make one reference to the Watson case. We anticipated the Frisco would rely on it to a great extent, and Mr. Fitzgerald, for the Government, has pointed out some difference between Watson and this case. Probably the major difference is with respect to independent motor carriers, that amended section 5 (2) (b) does not apply, so that when the Watson case reached the Supreme Court the court was faced with the situation where there was nothing in the statute to pro-

hibit the Commission from granting Watson the authority Watson said they had approved. The question simply was whether the Commission had made an error along the way, and Watson, in his motion, pointed out to the Supreme Court there was no substantial federal question presented, and I think you have to agree to that because Watson was under no prohibition from obtaining a complete all-out motor carrier service as is the Frisco or indeed any other railroad when it filed a purchase application under Section 5.

Perhaps another important factor under the Watson case was this: In the Watson case the report of the Commission's Examiner became the report of the Commission by operation of law. It was not passed on formally by the Commission, so that when the question got to the court the court had no formal reports of the Commission to which it could refer to get at the Commission's thinking. Here the court will have no trouble. There have been reports of the Examiners here, there have been reports of Division 5, there have been reports of the full Commission after oral argument. The Commission's thoughts in here are certainly on the record. In the Watson case they were not. The court had to simply guess what was in the Commission's mind and, of course, as Watson stressed again and again, in their motion, the Commission simply issued an order after Watson had been operating four years, no hearing at all. I think the Watson case is very susceptible to the argument if the Commission had formally reopened the Watson docket and held hearings that it might very well have been upheld if it had ultimately issued Watson a restricted certificate as it did without holding hearings because I suspect also, in that case, Watson could have convinced it that it was entitled to all of the authority which it ultimately got.

Thank you.

Mr. Highsaw: May it please the Court, one point I would like to make which I do not believe has been adverted to

in the argument heretofore, and that is what happened here. The problem involved here is not a problem of transportation. The Government Civil Aeronautics Act is an act almost identical to the Interstate Commerce Act with respect to granting certificates and also the manner in which they can revoke, and restrictions upon their revocation. The Civil Aeronautics Board, indeed the President of the United States in his position in aiding the Civil Aeronautics Board in the administration of that act has been faced identically with this problem, and what they have done in those cases has been what the Commission has done here. I think it lends weight to the reasonableness of the ICC interpretation of their statute. I think it also indicates that this type of mistake is a mistake which not only can be made by an overburdened staff of the ICC but can be made even on the highest levels of the Government, and two of the examples of those mistakes, if the interpretation of the gentlemen from the Frisco is correct, could have led to horrendous results. One of them is a case, the Civil Aeronautics Board at the specific direction of the President of the United States found Western Air Lines should be granted a certificate between Los Angeles and Mexico City. Now, the subsequent certificate which was issued, which went through the Attorney General's office, the Bureau of the Budget and the White House Staff and was signed by the President, omitted any mention of Western Air Lines and granted a certificate to another carrier, namely, Pan American Airways. The Board, when that mistake came out, did what the ICC has done here, and the argument of the Frisco Railroad would lead to the conclusion that all the Government could have done in that case would be to sit idly by and let Pan American Airways operate a route between Los Angeles and Mexico City in spite of the fact it was clear it was intended to go to Western Air Lines.

Another instance of error of that type occurred in the Civil Aeronautics Act which also involved the Pan Amer-

ican Airways. In a case which involved Pan American North Atlantic route, by mistake they were given the right to serve Bermuda on the North Atlantic, which was very important in terms of economic conditions and competition and other factors in the situation. They insisted pretty much as the Frisco has here, that this was not an inadvertence, and they were entitled to go ahead and do this in spite of the fact the original opinion of the board had not granted them the right to serve Bermuda. There was a board case on that which I will cite in my brief, 7 CAB 849. What the board said there, very briefly about it, I think not only has some bearing on the general reasonableness of this problem but also with relation to the Frisco Railroad to the dispute, and what they should have done, because Pan American there had made the same kind of argument, that they had received this certificate and they were entitled to take a look at that and nothing else, and go head and operate. The Board said the evidence leads to the existence of a patent ambiguity. The exercise of prudent judgment would have led this carrier, in view of its constant and almost daily contact with the Board, to make some inquiry of the Board as to the extent of the rights it now seeks to exercise under the certificate. I think the same thing is applicable to the Frisco.

There is one other point I would like to make, and my recollection is that counsel for the Frisco stated, I believe it was the Commission's opinion on the complaint of Campbell "66", in which the Commission compared a certificate to a judgment or order in a court proceeding. Well, of course, as this court knows, under the Federal Rules of Civil Procedure, Rule 60, and also Rule 36 of the Federal Rules of Criminal Procedure, the courts have clear power at any time to correct clerical mistakes arising from oversights or omissions in orders or judgments, and I do not think a piece of paper issued by an administrative agency, whether it is denominated certificate or denominated something else, can reasonably have any greater legal advan-

tage or any greater protection than an order or judgment of our federal courts under our federal system.

Mr. LaTourette: If Your Honors please, you have heard quite a lot about this case and I shall limit my remarks very much and rely upon filing a brief with the court relative to the issues in this matter.

I would just like to point out I happen to represent some of the motor freight lines which will be affected should this Commission's order be reversed, and we wish to support the argument of the Commission and the Government in support of the Commission's order.

I would like to point out that during the time that all of these proceedings were going on, it is indicated that this hearing, further hearing on these six cases was held in Kansas City on April 8, 1946. During all that time we were in the process of trying before the Commission the case of Frisco Transportation Company—purchase Righter Trucking Company, which has not been mentioned in the argument up to that time, and that was a case in which the Frisco Transportation Company sought to purchase the operating rights of Righter Trucking Company running from St. Louis to Memphis, and they pointedly made the statement during the hearings that they would purchase it so that they could operate it as an independent motor carrier and if that authority were not granted by the Commission they would not elect to buy the operation. The matter went to hearing before an Examiner. It was orally argued before the Commission, and I personally was in that case. It was decided by the Commission adversely to the Frisco on that ground, that the Frisco wished to operate this property independent of any rail operation. That decision is reported in 45 MCC 13, to which I will refer in my brief. Thereafter the Frisco filed a petition for reconsideration in which they then said to the Commission, "We will accept this operating right restricted and produce key points," and you will notice on the map which was furnished you by counsel for the Frisco three

red dots extending over the line running from St. Louis to Memphis, and Memphis is the fourth dot. Those are key points. The Frisco was not permitted to carry by truck between St. Louis and Memphis, and it was required to use as key points Cape Girardeau, Chaffee and Jackson, Missouri, in connection with their operations. Now, the case was tried in 1944 and all during that time these proceedings that we have been talking about all day were before the Commission, and Mr. English, the very witness whose name was mentioned in these proceedings, sat on the witness stand and I was very careful to ask him five or six times during the hearing as to whether or not the Frisco insisted upon the purchase of these rights permitting them to perform independent operations, and he said no. It was on that very basis the Commission in 1946 issued its order denying the application for that reason, and in 1947, after the Frisco had repented, may I say, and went to the Commission and said, "We will accept these restrictions and key points," did the Commission then decide the case favorably in October of 1947, limited in the manner that I have indicated heretofore.

Now, we think that definitely Section 5 (2) (b) is the important section. I think it controls the acquisition of these rights by the Frisco Transportation Company. It is in accordance with the long established policy of the Commission, and I think it carries out the National Transportation Policy, and I submit the Commission's order should be sustained.

Mr. Griffin: If Your Honors please, I represent Campbell "66" Express, which is another one of the motor carriers involved in this matter. I would like to point out for a moment the position of Campbell "66" and the other motor carriers. They were parties to the proceedings before the Commission in the original finance matters which culminated in orders of 1939. Those orders became final; no appeal was taken by the Frisco, and the motor carriers, so to speak, laid down their arms and went home thinking

the thing was closed finally and over with, and that the Frisco would operate subject to restrictions making them auxiliary or supplementary to the parent railroad.

The compliance order, compliance notices were not sent to the motor carriers; that was not the policy or part of the Commission to send those to the opponents. The first thing the motor carriers knew was when the Frisco Transportation Company was operating in all-out competition instead of competition from their own kind. The motor carriers we represent found themselves competing with the large railroad instead of small, relatively small, motor carriers. Now, as soon as that happened Campbell "66" and other carriers went to the Commission with the complaint of which you have heard and I won't repeat that. I do want to emphasize, though, that Campbell "66" and the other carriers had no notice, no opportunity to be heard when the compliance orders were issued and the certificates were ultimately issued. As far as we knew the matter had come to an end when the final order of the Interstate Commerce Commission had been issued in the finance cases.

I submit whether the compliance order was inadvertent or by design, or whether the issuance of the certificates was inadvertent or by design we had no notice of it, we had no opportunity to be heard, and we are in the position, actually in the position of having, as we brought to the attention of the Commissioner, of having our rights trampled upon. We had not been accorded due process of law. As I say, we immediately brought it to the attention of the Commission and this matter grew ultimately out of that fact.

Judge Van Oosterhout: Everybody representing defendants and intervenors have all spoken? All right.

Mr. Grinnell: If Your Honors please, do you think it would be possible for us to have about five minutes, and perhaps we can hit the time all of us agreed on?

Judge Van Oosterhout: Take five minutes recess at this time.

(A recess for five minutes was taken.)

Judge Van Oosterhout: Mr. Grinnell.

Mr. Grinnell: If the Court please, I believe I will start in inverse order and run through the gentlemen that did not talk as long, and then with a couple of comments about their statements, and return.

Judge Van Oosterhout: Any way you want to do it.

Mr. Grinnell: My recollection is Mr. Griffin said that they were not able to be represented in any of these basic proceedings, or were not represented—or no, he said they were represented in the basic proceedings. My recollection of the record is that they were not, but at any rate his statement that they had no opportunity to take any objection to the compliance orders is somewhat repudiated by the holding in the Crescent case which Mr. Johns, I believe it was, cited because specifically in that holding, or in that opinion it points out that the compliance order came out and apparently some of the parties thought that it was too broad and so protests were filed, I am not sure in this case, and there is not anything in the record here to show upon whom these orders were served; at any rate they were public documents and at least in some of the cases, in this Crescent case, where they described the procedure we know that in that case the parties did make an objection, and so the Commission re-examined the compliance order. Now, there was nothing ever done in any case here involved to these compliance orders, they were allowed to stand for three whole years without any question.

Now, in connection with Mr. LaTourette's statement as to the Righter case, that falls right in the argument we make that there was a change in policy because that case was decided after this case was reopened, and after the Commission had decided that they would not issue any

more unrestricted certificates to rail-owned affiliates, and that is what we complained about, one of the things is that this case and these certificates were the result of actions before that change in policy came along, and now they are trying to impress the change upon our previously unrestricted certificates, and it is almost impossible to read that Righter case, which will be cited I am sure, and not see that the Commission recognized all along that these were unrestricted certificates, and now since they changed their policy they were not going to let any more of those out. As a matter of fact, the holding in the first case which I discussed this morning in connection with the construction or the Commission's view of this principle of granting rights to rail-owned motor carriers, the Pacific Motor Trucking case is an answer to almost all of these arguments.

Judge Van Oosterhout: What year was that decision?

Mr. Grinnell: That was December 23, 1943, eleven months after the decision in the Texas and Pacific case, which was the first time the phrase "auxiliary and supplementary" had been defined to exclude the handling of all-out truck freight. Now, that case draws the line right down, it tells everything, and it will be cited in our brief. It tells the type of evidence these people put in and what the Commission thought. It says, "But no condition has heretofore been imposed in acquisition cases limiting the transportation authorized solely to transportation in combination with the railroad of the railroad freight." Now, that is an answer to an awful lot of the contentions here this morning. I mean, everyone has mentioned the Rock Island case. I believe I said at the beginning that the Rock Island case is in our view determinative of the Commission's power in the Bennett certificates, but I do not think the fact that they have the power to impose those conditions means that they have the unbridled power to do it without any kind of a finding whatsoever. They must find that something is necessary over and above this change of

policy that they seem to have adopted at some time after our certificates were issued. They have got to make some kind of a finding and they do not do it here in this opinion. They say: "Our power in the Bennett case is confirmed by the Rock Island case and it will be hereafter discussed"; the balance of the opinion does not mention the Bennett purchase. The same exact language almost appears in the Division 5 opinion. "Our power in the Bennett case is confirmed in the Rock Island case and we will hereafter discuss it"; and we haven't been able to find in the opinion where they discuss it. To our minds it is not surprising because there just was not anything in the record of reopening about imposition of conditions on that segment, the effect of it, why it should be done or anything else.

Now, in connection with Mr. Fitzgerald's statement about the 275 miles, it takes only a look at this map to see that if those rights are taken away in the middle of our long-haul routes, that it is more than just 275 miles. It means that we cannot haul all-out truck freight from St. Louis through those segments and on to Oklahoma City because there is a gap in the middle of our rights. It is gone, and the same thing is true of the route from Kansas City to the southeast, it also is cut in the middle. In other words, the 275—it is actually 284—is not determinative of the importance to this company of the restrictions imposed by this order.

Now, Mr. Fitzgerald also said that the Commission refused to grant us the right to purchase these carriers without restriction. That is not the language of the reports, all of which are referred to in the complaint and will, of course, be referred to in our brief. The language is that of approval, and the reservation that they talk about here is the last clause in the decision—"We find that the purchase by Frisco Transportation Company of the operating rights and property of Hamm doing business as Southwest Freight Lines, including the right to a certificate

issuable in certain docket number, covering rights herein authorized to be transferred on terms and conditions set forth in the title application which terms and conditions are found to be just and reasonable, will be consistent with the public interest, will promote the public interest by enabling the St. Louis-San Francisco Railway Company to use the services by motor vehicle to public advantage in its operation, will not unduly restrain competition and that the conditions of Section 213 have been or will be fulfilled, provided, however, that the authority herein granted is subject to such further limitations and restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the railway company and shall not unduly restrain competition." At the same time and throughout the same period other cases came out in which that reservation was not there, and those certificates were combined with the certificates here, some of them cover the same routes. The Blake purchase, for instance, in which no such reservation appears, covers a part of the route over which Tolson was authorized to operate so that you have the situation where in the Blake purchase they said it was all right to do it and in the Tolson purchase they said that it is all right to do it provided; but then when the certificate came out in both of those cases there was no reservation on it.

Now, I think that state of facts is somewhat an answer to their claim that we should have known, we should have gone to the Commission and said, "Here, these things came out and they were restricted in some cases, in others they have a proviso in there but the certificates came out unrestricted." The compliance orders did not contain any proviso. Is omission only, is that sufficient notice? It does not seem to me when a case comes along where there is no reservation, and then a case comes along where there is a reservation, and in both of them an unrestricted certificate is issued, that we were in any way put on notice

of anything except that the auxiliary and supplementary, as used in this proviso, was being construed to mean what the Commission, despite their contentions now to the contrary, has always held that it meant—in the Barker case, limitation from a geographical standpoint only and not for type of service; and each one of these cases, the rights are parallel to the railroad. Now, we did not have anything that could put us on notice.

Now, Mr. Fitzgerald, I believe also said that there was no evidence that there was no error. Exhibits 10-A to 16-A which were made a part of the record in this case and identified by witness Bryant, the correspondence refers in Exhibit 10-A, it covers the Hamm purchase, the first letter is from the Director of Bureau of Motor Carriers to the Transportation Company: "The Commission by its order No. MC-F-618 authorized the purchase by Frisco Transportation Company of operating rights and property of John Hamm, doing business as Southwest Freight Line." There is nothing in there about reservation. This one tells us to file adoption notice adopting that carrier's tariffs. Mr. Bryant replied attaching the adoption notice which adopts the tariffs. Now, this carrier had all out authority, and that is what his tariffs covered, and those are the ones that they let us adopt. All these things took place prior to the compliance order, and then the compliance order comes out without any restriction, reservation or anything else in it. I do not think that you can read those exhibits and reach any conclusion but that there was no inadvertence in this case.

Now, no one has attempted to really distinguish the Watson case. If the Commission has no inadvertence power, and that is surely what the Watson case holds, this case is founded on the wrong premise, and no one has attempted to even show how it could otherwise have been done on the basis of the language in the report. It is founded and it was done on the inadvertence power which

they had implied to themselves, and they just do not have it as things finally show up now.

The statements from the transcript which one of the counsel read will show that we at one time were following the Smith case. We did not think it was right necessarily, but those statements were in connection with and followed definitely the ruling in the Smith case. It turned out now that the Commission was wrong, as we always thought they were when they come to certificates, and say no, "we were wrong, we made a mistake", but I think that the Watson case, the theory that their policy was changed which is carried out or developed through all their arguments, that now it is different than it was because actually there are many railroad-owned carriers, truck carriers who do not have these restrictions. We are not the only one. This is not the last ditch fight. We are just one of many. They have changed their policy and they have tried to enforce it on us.

Regardless of anything else, if they are going to find that these certificates were inadvertently issued they must have evidence on which to base that finding. They can't just pick it out of the air as they have done here and infer it merely from the fact that a reservation appeared at one point and did not appear at the other, particularly when there was in between those two a valid order of the Commission which provided for the issuance of these unrestricted certificates.

Thank you.

Judge Van Oosterhout: I think probably this is the logical place to perhaps complete the argument.

Mr. Fitzgerald: I did not want to offer rebuttal, Your Honor. I was going to suggest filing my briefs.

Judge Van Oosterhout: Oh, yes. That will be fine. With reference to the briefs, the plaintiff has requested fifteen days. Is that still your wish?

Mr. Grinnell: Yes, I think we can do it. We are basically ready now.

Judge Van Oosterhout: The parties will be given fifteen days from this date to file briefs, and plaintiff suggested that the defendants and intervenors be given thirty days. Do you want that much time?

Mr. Johns: Since the United States is filing its brief today, I think we will file our brief also. We have one prepared.

Judge Van Oosterhout: Any briefs the parties have can be filed now or they can be reserved. You may file the brief now and after an examination of plaintiff's brief determine you want to file a supplemental brief and answer some matter that might not have been covered in your brief, you have the privilege of doing that.

Mr. Fitzgerald: Within the time the intervenors are to file theirs?

Judge Van Oosterhout: Plaintiff will be given fifteen days to file its brief. Then the defendants and intervenors will be given thirty days thereafter within which to file any supplementary brief they may choose, and after the lapse of that thirty days fifteen days to plaintiff to file a reply brief.

Mr. Grinnell: May it be understood we will not attempt to reply to these briefs until our brief is filed?

Judge Van Oosterhout: I think that is the logical and orderly procedure, that you file your main opening brief, and reply to any briefs that may be filed here, in the reply brief, rather than the original brief. That is you can do it anyway you like, that you prefer, I see no objection to that.

Mr. Johns: May we hand these up?

Judge Van Oosterhout: There is nothing further, the case will be considered submitted subject to the rights of filing briefs as indicated and within the time that has been indicated.

Certificate.

I hereby certify that I was present at the hearing had in the case numbered and entitled, and on the day as shown on page one of this transcript, and that I reported the proceedings, in shorthand, truly and accurately, to the best of my ability, and that pages 4 through 155 hereof contain a true and accurate transcript of my original shorthand notes of the matter contained in said transcript.

Charles P. Armbruster,
Official Court Reporter.

[fol. 175] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

No. 10272(1)

FRISCO TRANSPORTATION COMPANY, a corporation, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*, Defendants.

MEMORANDUM OPINION—June 28, 1957

Before Van Oosterhout, Circuit Judge, Moore and Harper, District Judges.

Appearances:

John E. McCullough, Ernest D. Grinnell, Jr., A. J. Baumann, St. Louis, Missouri, appeared on behalf of the plaintiff, Frisco Transportation Company, a corporation.

Wayne H. Bigler, Asst. U. S. Attorney, St. Louis, Missouri, and Maurice A. Fitzgerald, Attorney, Department of Justice, Washington, D. C., appeared on behalf of the United States of America, defendant.

C. H. Johns, Asst. General Counsel, Interstate Commerce Commission, Washington, D. C., and Wayne H. Bigler, Asst. U. S. Attorney, St. Louis, Missouri, appeared on behalf of the Interstate Commerce Commission, defendant.

B. W. LaTourette, St. Louis, Missouri, appeared on behalf of Viking Freight Company, Be-Mac Transportation Company, C. E. S. Truck Lines and L. A. Tucker Truck Lines, intervenors.

Peter T. Beardsley, Washington, D. C., appeared on behalf of American Trucking Association, Inc., and its Regular Common Carrier Conference, intervenors.

Carroll J. Donohue, St. Louis, Missouri, and James L. Highsaw, Washington, D. C., appeared on behalf of Railway Labor Executives Association, intervenors.

Wentworth E. Griffin, Kansas City, Missouri, appeared on behalf of Campbell "66" Express, intervenor.

[fol. 176] MEMORANDUM OPINION

Harper, Judge.

This is an action by the Frisco Transportation Company, a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission entered on December 7, 1953, which order purports to cancel certain certificates, and at the same time new or amended certificates would be issued.

This court has jurisdiction of the subject matter of this action, 28 USCA, Sec. 1326, and the case was heard by a court composed of three judges pursuant to Sections 2321-2325, 28 USCA.

At issue in this proceeding is the propriety of the cancellation and re-issue in restricted form of five operating certificates authorizing motor carrier operation by plaintiff in areas adjacent to those served by the Frisco Railroad. The Commission contends that four of these certificates issued in the year 1942 were incomplete in form in that they failed to include, due to a clerical error, a reservation of the power to restrict the operations of plaintiff by imposing limitations designed to insure that plaintiff's motor carrier service would be auxiliary and supplemental to the parent company's rail service, the necessity and propriety of such reservations of power having been determined in the finance hearings conducted when plaintiff sought to purchase truck routes from those then operating them. Plaintiff denies that such certificates were in fact issued with an inadvertent omission of the reservation of power previously determined necessary, and asserts further that, even should this be [fol. 177] the case, the Commission is without power to correct them at this time, its power in this respect being limited by Sec. 212(a) of the Interstate Commerce Act, 49 USCA, Sec. 312(a).

With respect to the fifth certificate (Bennett), the plaintiff asserts that the Commission is without power to restrict its operation.

Under consideration in the original hearings of 1938 and 1939 and in the re-opened Commission proceedings beginning in 1945, which resulted in this action being brought, were six truck routes identified before us by the name of the vendor from whom purchase was authorized. These are the "Cooper" route from Joplin, Missouri, to Carthage, Missouri; the "Hamm" route from Joplin, Missouri, to Miami, Oklahoma; the "Tolson" route from Walnut Ridge, Arkansas, to Memphis, Tennessee; the "Parker" route from Blytheville, Arkansas, to Memphis, Tennessee; the "Rose" route from Hugo, Oklahoma, to Paris, Texas; and the "Bennett" route from Blytheville, Arkansas, to Lake City, Arkansas. In its reconsideration of the "Rose" certificate the Commission ordered no change. The operating certificate for the "Bennett" route was issued in 1940 with the recital of a reservation of power to impose additional restrictions on the scope of activities permitted under the certificate, and hence, under the rule of *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, rehearing denied 341 U.S. 906, there can be little question of the power of the Commission to impose the restrictions which it has incorporated in the amended Bennett certificate. These restrictions are as follows:

> [fol. 178] "1. The service to be performed by the Frisco Transportation Company, hereinafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, hereinafter called the Railway, except that this condition shall not apply with respect to Dyess, Ark.
>
> "2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.
>
> "3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of

said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Memphis, Tenn., and Amery-Tupelo (considered as one), Miss.

"4. All contractual arrangements between the Transportation Company and the Railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

"5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the railway."

Determination of the propriety of the change made in the four remaining certificates requires a somewhat more detailed examination of the administrative history of the certificates which plaintiff seeks to retain unaltered. In 1938 and 1939, finance hearings were held by an examiner for the Commission with regard to the acquisition of truck routes by plaintiff, organized in 1937, to provide co-ordinated rail-motor carrier service. After the finance hearings on these four acquisitions the examiner made his report approving acquisition by plaintiff of the routes, but in each case concluded his report with the following language:

" * * * Provided, however, that the authority herein granted is subject to such further limitations or re- [fol. 179] strictions as the Commission may hereinafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said Railway Company and shall not unduly restrain competition."

Following the finance hearings, Division 5 of the Interstate Commerce Commission approved and adopted the report of the Hearing Examiner, with one commissioner dissenting. Following the action by Division 5 of the Commission, the plaintiff completed the purchase, and operations were commenced by the plaintiff in early 1939, and

have continued without change as to the nature of or without interruption to the present time.

Thereafter, in June and July of 1939, compliance orders were issued by Division 5 of the Commission with respect to the four routes in question. The compliance orders do not contain the limitations contained in the findings in each of the finance proceedings. In 1942, certificates were issued by the Commission to the plaintiff with respect to each of the four routes, which certificates do not contain the limitations contained in the findings in each of the finance proceedings.

In July, 1941, before the issuance of the certificates under consideration, competing motor carriers filed complaints with the Commission alleging that plaintiff was operating a motor carrier service independent of parent Railway's rail service and in contravention of the condition imposed by the Commission in the finance hearings. Proceedings were had by the Commission to inquire into these complaints, and the Commission in 1946 concluded that plaintiff was not operating in violation of the terms of its certificates. The Commission indicated, however, that the ruling should not be taken as sanctioning such operation, since the pro- [fol. 180] ceedings pursuant to which the certificates in question were issued to the plaintiff had in fact already been re-opened for further hearing. The Commission had started these hearings in 1945, in Division 5, and Division 5 held that the operating certificates had been issued with an inadvertent omission of the proviso set out in the report of the finance hearings, and directed the cancellation and re-issue of the certificates.

Upon a petition for reconsideration presented to the full Commission, the matter was reheard by it in November, 1952. A report of the Commission issued in December, 1953, upheld the action of Division 5 in incorporating the restrictions in the operating certificates, in a divided opinion, four commissioners dissenting and one not participating. A petition for reconsideration was denied by the Commission in April, 1955, and this action was commenced a month later.

A three-judge court, in *Watson Bros. Transportation Co. v. U. S.*, 132 F. Supp. 905 (Affirmed 350 U.S. 927), said, l.c. 909:

> "Counsel for the Commission argues that the order of August 25, 1953, merely corrects a clerical error in the certificate of July 19, 1949. Even if the court were to assume that the Commission has authority to correct clerical errors without notice and hearing, the result in this case would not be different, because it is the holding of the court that the order of August 25, 1953, is more than the mere correction of a clerical error; and is an attempt made contrary to Section 212 to revoke and change a certificate duly issued."

The court in the above language clearly indicates that certificates duly issued cannot be modified in the manner sought to be modified in the case before us, even though some prior report of the Commission indicates to the contrary. This is clearly borne out by the dissenting opinion [fol. 181] of Judge Johnsen in that case, wherein he said, l.c. 909-10:

> "The effect of the majority opinion is to hold that, where the Commission has defined the scope of public convenience and necessity existing in a particular situation, by a finding such as the statute requires, but it has in some manner issued a certificate in excess of or contrary to the limits of the public convenience and necessity so found, it can not call in the certificate or engage in any correction or reissuance thereof, in order to make the certificate conform to its finding, unless it grants the holder a hearing."

The case before us with respect to the four certificates in question is a much stronger case on the part of the plaintiff insofar as the facts are concerned than the *Watson Bros.* case. Here intervening between the issuance of the finance report and the certificates in question, was the issuance by the Commission of compliance orders, which did not contain the limitation contained in the findings in the finance proceedings. The action of the Commission in adopting

the finance hearing report was not unanimous. Between the time that the compliance orders were issued and the four certificates were issued, a certificate was granted with respect to the Bennett route, in which the limitations were imposed. Thereafter, and before the certificates were issued by the Commission, proceedings were instituted by competing motor carriers, complaining that the restrictions set up in the finance hearing report were applicable and that the plaintiff was operating in contravention of those conditions.

After all of these things had occurred the four certificates in question were issued. We must bear in mind that insofar as the Commission is concerned, that the words "auxiliary to" or "supplemental of" are not taken from the Act as set forth in the *Rock Island* case, supra. At pages 433-34, the court said:

> [fol. 182] "But power in the Commission, before issuance of a certificate or approval of acquisition, to limit railroad motor operations so as to make them auxiliary and supplemental to rail service does not necessarily imply power to change the conditions designed to bring about the desired coordination, after issuance of the certificate. The parent railroad may have acquired or developed its motor affiliate in reliance on the conditions stated in the certificate."

The Commission in *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, l.c. 472, said:

> "We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding."

As was said by the Supreme Court in the *Rock Island* case, supra, l.c. 448:

> "What slight bearing *Seatrain* has weighs on the side of the interlocutory character of the approval order. The sentence referred to reads:
>
> "'But, as the Commission has said as to motor carrier certificates, while the procedural "orders" antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding.'"

Under the *Watson Bros.* decision, the action of the Commission is an attempt made contrary to Section 212 to revoke and change a certificate duly issued, and is more than the mere correction of a clerical error.

While the above disposes of the case, we are further persuaded that no clerical error exists. The functions of the reviewing court are exhausted when there is found to be a rational basis for the conclusions approved by the [fol. 183] administrative body. *Rochester Telephone Co.* v. *U. S.*, 307 U.S. 125; *Mississippi Valley Barge Line* v. *U. S.*, 292 U.S. 282.

In the *Mississippi Valley Barge Line* case, supra, l.c. 286-87, the Supreme Court said:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

The courts, however, have held in reviewing administrative orders that the orders must be supported by evidence. In *Lang Transportation Corporation* v. *U. S.*, 75 F. Supp. 915, l.c. 924, the court said:

> "Orders of the Interstate Commerce Commission which are contrary to and without adequate support in the evidence are void and have been consistently set aside by the courts." Citing *Eastern Central Motor Carriers Association* v. *U. S.*, 321 U.S. 194; *Florida* v. *U. S.*, 282 U.S. 194; *Baltimore & Ohio Railroad Company* v. *U. S.*, 264 U.S. 258, and a number of district court cases.

In the instant case the four orders last referred to are without adequate support in the evidence. The history of the case we have set forth above clearly demonstrates that what was sought to be accomplished here, at this late date, was to restrict the operations of the plaintiff, not because a clerical error had occurred, but based upon the question of whether or not such was desired. A statement by Examiner Croft, at page 59 of the transcript of the hearing, bespeaks as much when he said during the hearing, before testimony was introduced:

> "Well, it is my assumption that if the Commission finds that restrictions are desirable, and if it concludes that it has authority to impose them at this time, they will put in restrictions similar to the so-called Kansas City Southern restrictions, including the condition 3, naming either key points or requiring an immediately prior or immediately subsequent rail haul. • • • In other words, I want information on which we can impose a workable restriction."

[fol. 184] Where does this indicate that the restrictions will be the result of correcting a clerical error or that the hearing is about a clerical error? The report of the finance hearing examiner as to the four routes was adopted by a divided division of the Commission, with one dissent. Who would say that the Commission is bound by the recommendations of the hearing examiner? The books are full of cases where the recommendations of the hearing examiners have not been followed, and yet the certificates are not the result of clerical errors. The Commission is not a rubber stamp for the conclusions of hearing examiners.

Months after the approval of the finance report by a divided division, compliance orders were issued for the four routes. Thereafter, a certificate was issued for the Bennett route containing restrictions. A complaint was filed by competing carriers, complaining that the plaintiff was ignoring the restrictions of the finance hearing report, but thereafter the four certificates were issued. In the face of all of this, the Commission would have us believe that the purported changes are made as the result of clerical error.

While, as set out above, under the *Watson Bros.* case we are of the opinion that the four certificates cannot be canceled as a result of the hearing conducted by the Commission since it was not conducted under Sec. 212 of the Act, yet, if we agreed with the dissenting opinion in the *Watson Bros.* case, we would still be of the opinion in this case that the four certificates in question could not be canceled and reissued because no clerical error in fact existed. We would not overrule the actions of the Commission taken at the time that the compliance orders were issued, [fol. 185] and the certificates were issued merely because the hearing examiner at the finance hearings would have put limitations on the certificates. For us to hold that the members of the Interstate Commerce Commission are bound by the recommendation of a hearing examiner in his report, a report that was adopted by a divided division, would be to hold that the members of the Commission could not have minds of their own.

Clerical errors should be readily apparent. Such is not the case here. Four of the members of the Commission dissented and one took no part. Two of the commissioners wrote dissents setting out that in their opinion the record does not justify the finding of the majority of the Commission.

The arguments advanced here for the defense are the arguments of the minority opinion in the *Watson Bros.* case, supra. What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such.

Judgment will accordingly be for the plaintiff with respect to the "Cooper", "Hamm", "Tolson" and "Parker" routes, and the action of the Commission confirmed with respect to the "Bennett" route. Attorneys for the plaintiff will prepare the appropriate Findings of Fact, Conclusions of Law and Judgment, and present same to the court for entry.

s/ M. D. Van Oosterhout, U. S. Circuit Judge, s/ Roy W. Harper, U. S. District Judge.

[fol. 186]

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

MEMORANDUM OPINION—June 28, 1957

Moore, Judge

Reluctantly, I must dissent from the opinion of the majority, believing as I do that the Interstate Commerce Commission acted correctly. After examining the record, I am persuaded that the omission of the proviso from the operating certificates (other than the "Bennett" certificate) was, in fact, a clerical error on the part of the Commission and not, as plaintiff alleges, the result of an intentional decision to reverse the determination made at the finance hearings at which both plaintiff and competing carriers participated and offered evidence. The unrestricted compliance orders which are at variance with the finance hearings' determinations were made without any hearing at which intervenor motor carriers might have been heard. The intervening motor carriers and the defendant Commission did not sleep on their rights in this matter. Protests were filed with the Commission even before the operating certificates were issued. I think it is significant that rail-affiliated motor carrier applications for authority to offer motor-carrier services to the public were a distinct minority of the total number of motor carrier service authorizations sought in the 'thirties and the 'forties; no doubt those charged with [fol. 187] the responsibility of issuing compliance orders and operating certificates found it easy to omit the proviso which was required on only a few of the motor carrier certificates with which the Section of Certificates dealt. I think it is also noteworthy that plaintiff did not file a petition for reconsideration after the conclusion of the finance hearings, as was its right under the procedural rules of the Commission. *I.C.C. General Rules of Practice, 101(a).*

I cannot see that Transportation Company's case would be any stronger if I were in fact persuaded that the omissions from the finance orders and certificates were intentional. I do not see how plaintiff could justify changes in the Commission's findings made without giving notice, or an opportunity to be heard to those appearing at the acquisition proceedings. *49 U.S.C.A. Sec. 305(a).*

I cannot accept the view of the majority that the Watson Bros. Transportation Co. case is controlling. The basis for my view is that the "power to modify" issue which the Watson case is supposed to have settled was expressly reserved by the Supreme Court in the Rock Island case, *supra*.

> "This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such procedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected." 340 U.S. 419, 445.

The decision of the three-judge court in that case was affirmed in the Supreme Court on motion. Rule 16-1(c) of the Revised Rules of the Supreme Court provides:

> "The Court will receive a motion to affirm a judgment sought to be reviewed on appeal from a federal court on [fol. 188] the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." 1954, 346 U.S. 951, 964.

The language of this rule persuades me that the Supreme Court did not affirm the decision below on this inadvertence issue, but rather on the lack of hearing and notice. I believe the section of the Interstate Commerce Commission Act, Sec. 212(a), which plaintiff offers in support of its position, is intended to prevent the Commission from making changes in certificates when such certificates have been lawfully issued in accordance with previous findings of the Commission made after due notice and hearing. I do not think that, for example, if in these administrative proceedings the Section of Certificates had erroneously issued a certificate of authority to an intervenor motor carrier instead of to Frisco Transportation

Company that such a mistake would permanently tie the hands of the Commission and thus nullify the previous findings made in the prior administrative hearings. On the issue of due process raised by the plaintiff I shall say only that I do not believe anyone can acquire an indefeasible interest in a mistake. I see no good reason in the absence of any clear legislative mandate to hold that so powerful an administrative agency as the Interstate Commerce Commission is unable to correct the clerical errors made by a subordinate entity not empowered to vary the findings and decisions of its creator.

Dated this 28th day of June, 1957.

s/ Geo. H. Moore, United States District Judge.

[fol. 189] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN JUDICIAL DISTRICT OF MISSOURI, EASTERN DIVISION

Civil Action No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*, Defendants.

JUDGMENT—August 9, 1957

This cause came on for final hearing on the complaint herein, praying for a decree enjoining and restraining the United States and its agency, the Interstate Commerce Commission, from enforcing the order of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding bearing the principal caption of MC 89913 Sub. No. 1, Frisco Transportation Company Extension—Joplin-Miami, and the chief judge of the United States Court of Appeals for the Eighth Circuit having called to the assistance of the Honorable George H. Moore, to hear and determine this cause, the Honorable Martin D. Van Oosterhout,

Judge of the Court of Appeals for this Circuit, and the Honorable Roy W. Harper, Judge of the United States District Court for the Eastern District of Missouri, Eastern Division, pursuant to Section 2281 of Title 28 of the United States Code, and said cause and the evidence therein having been heard before said three judges, it is

Ordered, adjudged and decreed that the United States of America and its agency, the Interstate Commerce Commission, be and they are hereby enjoined from enforcing the second ordering paragraph of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding bearing the principal caption MC 89913 Sub. No. 1, Frisco Transportation Company Extension—Joplin-Miami, and [fol. 190] said second ordering paragraph is hereby forever set aside, suspended and annulled. The relief sought by plaintiff in connection with its certificate bearing No. MC-89913 (Sub. No. 10) is denied, and the Interstate Commerce Commission's Order with respect thereto is affirmed.

Dated Aug. 9, 1957.

s/ Martin D. Van Oosterhout, United States Circuit Judge, s/ Roy W. Harper, United States District Judge.

George H. Moore, United States District Judge, dissenting.

[fol. 191] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN JUDICIAL DISTRICT OF MISSOURI, EASTERN DIVISION

Civil Action No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*, Defendants.

Findings of Fact and Conclusions of Law— Filed August 12, 1957

Findings of Fact

1. (a). Plaintiff, Frisco Transportation Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business in the City of St. Louis, Missouri.

(b). United States of America is named a defendant pursuant to Section 2322 of the Judicial Code, 28 USCA Section 2322.

(c). The Interstate Commerce Commission intervened as a defendant in accordance with the provisions of Section 2323 of the Judicial Code, 28 USCA Section 2323.

(d). Be-Mac Transport Company, Inc.; Viking Freight Company, C. E. S. Truck Lines, Inc.; L. A. Tucker Truck Lines, Inc.; Consolidated Forwarding Company, Inc.; American Trucking Associations, Inc. and its Regular Common Carrier Conference; Railway Labor Executives Association; Brotherhood of Railroad Trainmen; Order of Railway Conductors and Brakemen of America; and Campbell "Sixty-Six" Express, Inc. were allowed to intervene as parties defendant after the filing of appropriate petitions for leave to intervene.

2. Plaintiff is a common carrier by motor vehicle engaged in the transportation of persons and property in interstate and intrastate commerce, and is a wholly owned subsidiary [fol. 192] of the St. Louis-San Francisco Railway Company, a common carrier by rail subject to the Interstate Commerce Act.

3. In this suit we are asked to review an order of the Interstate Commerce Commission cancelling certain operating certificates of plaintiff bearing the numbers MC 89913 Sub. No. 1 (Hamm), MC 89913 Sub. No. 3 (Cooper), MC 89913 Sub. No. 5 (Parker), MC 89913 Sub. No. 6 (Tolson), and requiring the issuance of new or amended certificates in lieu thereof. We are also asked to review the same order insofar as it modifies a certificate of plaintiff bearing num-

ber MC 89913 Sub. No. 10 (Bennett). The names in parentheses are the parties from whom plaintiff purchased the operating rights represented by these certificates. These names will sometimes be used in referring to the certificates in these findings and conclusions.

4. The proceedings before the Commission also involved plaintiff's certificate bearing number MC 89913 Sub. No. 2 (Rose), but since the Commission did not order any modification of that certificate, no action by this Court is necessary on the portion of the order dealing therewith. Therefore, the remaining findings of fact do not apply to that certificate.

5. On October 17, 1939, plaintiff filed an application to purchase a portion of the motor carrier operating rights and property of Bennett. After hearings were held, the Commission approved said purchase on March 15, 1940. A memorandum decision reporting this approval appears in 35 MCC 802. On June 13, 1940, the Commission granted plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 10, authorizing plaintiff to engage in interstate or foreign commerce as a common carrier by motor vehicle over the operating rights purchased from said Bennett, which said certificate contained the following:

> "The operations herein authorized are subject to such further limitations, restrictions, or modifications as the Commission may hereafter find it necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the St. Louis-San Francisco Railway Company, and shall not unduly restrain competition."

[fol. 193] 6. During the years 1938 and 1939, plaintiff filed applications to purchase the motor carrier operating rights and properties of Hamm, Cooper, Parker and Tolson. After finance hearings were held, Examiner's Proposed Reports were issued in connection with each of these applications, which Reports approved the purchase by plaintiff of the operating rights and properties of these motor carriers and concluded with the following language:

"* * * Provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereinafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said Railway Company and shall not unduly restrain competition."

7. Division 5 of the Interstate Commerce Commission approved and adopted the Reports of the hearing Examiners, with one Commissioner dissenting in each case. These Reports appear as follows: Hamm-15 MCC 320; Cooper-15 MCC 317; Parker-25 MCC 96; Tolson-25 MCC 96.

8. Following the action by Division 5 of the Commission, plaintiff completed the purchases, and operations were commenced by the plaintiff in early 1939, and have continued without change as to the nature of or without interruption to the present time.

9. On March 11, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Cooper, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued its order (commonly referred to as a "compliance order") in Docket MC 89913 Sub. No. 3, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Joseph D. Cooper, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On March 31, 1942, the Commission granted to plaintiff a certificate of [fol. 194] public convenience and necessity bearing number MC 89913 Sub. No. 3, including inter alia the operating rights purchased from Cooper, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

10. On March 14, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Hamm, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in

interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 1, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by John Hamm, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On March 31, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 1, including inter alia the operating rights purchased from Hamm, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

11. On June 16, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Parker, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 5, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Joseph W. Parker, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On April 18, 1942, the Commission granted to plaintiff a [fol. 195] certificate of public convenience and necessity bearing number MC 89913 Sub. No. 5, including inter alia the operating rights purchased from Parker, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

12. On July 10, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Tolson, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issed (sic) a compliance order in Docket MC 89913 Sub. No. 6, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating

authority previously applied for by Louis Tolson, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On April 18, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 6, including inter alia the operating rights purchased from Tolson, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

13. In July 1941, prior to the issuance of the certificates of public convenience and necessity in Cooper, Parker, Hamm and Tolson, competing motor carriers filed complaints with the Commission, alleging that plaintiff was operating a motor carrier service independent of its parent railroad's rail service and in contravention of the condition imposed by the Commission in the finance hearings. After appropriate proceedings, the Commission concluded in 1946 that plaintiff was not operating in violation of the terms of its certificates (46 MCC 222). The Commission's opinion indicated that the ruling should not be taken as sanctioning such operation since the proceedings pursuant to which the Hamm, Cooper, Parker and Tolson certificates were issued to plaintiff had been reopened for [fol. 196] further hearing.

14. The proceedings which resulted in the Commission's order of December 7, 1953, had their beginning on January 4, 1945, when the Commission entered an order reopening for reconsideration the proceedings by which plaintiff acquired the Hamm, Cooper, Parker and Tolson certificates.

15. On April 8, 1946, such reopened proceedings were heard by a hearing Examiner. During that hearing, the hearing Examiner made the following statement:

> "Well, it is my assumption that if the Commission finds that restrictions are desirable, and if it concludes that it has authority to impose them at this time, they will put in restrictions similar to the so-called Kansas City Southern restrictions, including the condition 3, naming either key points or requiring an immediately prior or immediately subsequent rail haul. • • • In other words, I want information on which we can impose a workable restriction," (59 of Transcript).

16. On May 17, 1948, a recommended report and order on further hearing was filed by Examiners William T. Croft and Beverly S. Simms.

17. After exceptions were filed, Division 5 of the Commission issued its report on further hearing on October 22, 1951. This report appears in 53 MCC 415.

18. After plaintiff filed a petition for reconsideration of the report of Division 5, the Commission reopened the proceedings for oral argument, and after such argument, the Commission modified the report of Division 5 by its report of December 7, 1953, which appears in 62 MCC 367. The order under attack was entered pursuant to this report.

19. Plaintiff's petition for reconsideration of this report and order was filed on February 2, 1954, and was denied by the Commission on April 4, 1955.

20. Plaintiff filed this suit on May 20, 1955, and on the same date a temporary restraining order was entered which enjoined the enforcement of the order of December 7, 1953, and the order of April 4, 1955.

[fol. 197] 21. The facts as to the various steps in the handling of this case beginning in 1938 and extending through the issuance of the certificates in 1942, as stated in findings of fact 6-13 inclusive herein, do not support the Commission's finding that such certificates were issued in their unrestricted form as a result of a clerical error or errors. Rather, a complete examination of the record fails to disclose any evidence that a clerical error in fact existed in the issuance of the certificates in question.

22. There was no evidence of record before the Commission which could be used as a basis for finding that a clerical error existed in the issuance of plaintiff's certificates bearing numbers MC 89913 Sub. No. 1, MC 89913 Sub. No. 3, MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6.

Conclusions of Law

1. This is an action to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission

entered on December 7, 1953 (62 MCC 367), which order purports to cancel certain operating certificates of plaintiff and at the same time issue new or amended certificates.

2. This Court has jurisdiction of the subject matter of this action, 28 USCA Sec. 1326, and the case was heard by a Court composed of three judges pursuant to 28 USCA Sec. 2321-2325.

3. Since the Commission did not order the cancellation or modification of the certificate bearing number MC 89913 Sub. No. 2 (Rose), no action by this Court is necessary in connection with the certificate bearing that number.

4. The Commission's action with respect to the certificate bearing number MC 89913 Sub. No. 10 (Bennett) was within its powers in view of the reservation of the power to impose additional restrictions on the scope of activities permitted under the certificate, and hence, under the rule of *United* [fol. 198] *States* vs. *Rock Island Motor Transit Co.*, 340 U.S. 419, rehearing denied 341 U.S. 906, the Commission's action with regard to that certificate is affirmed and no injunction should issue as to that part of the order.

5. Plaintiff's certificates bearing the numbers MC 89913 Sub. No. 1 (Hamm); MC 89913 Sub. No. 3 (Cooper); MC 89913 Sub. No. 5 (Parker); MC 89913 Sub. No. 6 (Tolson) were duly issued.

6. The granting of a motor carrier certificate by the Commission marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. *Smith Bros. Revocation of Certificate*, 33 MCC 465, 472.

7. Motor carrier certificates duly issued cannot be modified in the manner in which plaintiff's certificates in this case were sought to be modified by the Commission, even though some prior report indicates the contrary. *Watson Brothers Transportation Company* v. *U.S.*, 135 F. S. 905 (affirmed 350 U.S. 927).

8. Section 212-(a) of the Interstate Commerce Act, 49 USCA Section 312-(a), sets forth the only basis for revocation of a motor carrier certificate as follows:

"Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder * * * ."

9. The action taken by the Commission in cancelling the Hamm, Cooper, Parker and Tolson certificates on the [fol. 199] ground that said certificates were "inadvertently issued", is an attempt made contrary to Section 212 of the Interstate Commerce Act to revoke or change a certificate duly issued, and is more than the mere correction of a clerical error.

10. Orders of the Interstate Commerce Commission must be supported by adequate evidence. *Lang Transportation Corp.* v. *U.S.*, 75 F. S. 915, 924; *Eastern Central Motor Carriers Assn.* v. *U.S.*, 321 U.S. 194; *Baltimore & Ohio Railroad Company* v. *U.S.*, 264 U.S. 258; *Florida* v. *U.S.*, 282 U.S. 194.

11. The finding in the order of December 7, 1953, that the Hamm, Cooper, Parker and Tolson certificates were "inad-

vertently issued" is without adequate support in the evidence.

12. Clerical errors must be readily apparent, and the alleged clerical errors in this case are not apparent.

13. Failure by the Commission to follow Examiner's proposed report is not a sufficient showing to prove that a clerical error existed.

14. The issuance of compliance orders as found in findings of fact 9, 10, 11 and 12, and the existence of a pending complaint challenging plaintiff's right to operate over these certificates as found in finding of fact 13, together with the statement by the hearing Examiner as found in finding of fact 21, and the issuance in 1940 of a restricted certificate in connection with plaintiff's Bennett purchase, negate the existence of clerical error in the issuance of the Hamm, Cooper, Parker and Tolson certificates, and compel the conclusion that no clerical error existed in the issuance of those certificates.

15. The Commission's order of December 7, 1953, as it applies to plaintiff's certificates bearing numbers MC 89913 Sub. No. 1, MC 89913 Sub. No. 3, MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6, should be enjoined, set aside, suspended and annulled because said order is contrary to the [fol. 200] provisions of Section 212 (a) of the Interstate Commerce Act, 49 USCA Section 312 (a).

16. In addition, because the Commission's finding that said certificates were issued as a result of clerical error is without the support of adequate evidence, the order of December 7, 1953, as it applies to the certificates described in conclusion of law 15, should be enjoined, set aside, suspended and annulled.

17. Either of the reasons stated in conclusions of law 15 or 16 would be sufficient in and of itself to require that the order be enjoined, set aside, suspended and annulled.

18. Because of our conclusion as stated in conclusion of law 15, it has not been necessary for us to consider the additional evidence offered by plaintiff at the hearing before this Court. Our consideration has been limited to the record made before the Commission beginning with the Janu-

ary 4, 1945 order reopening for reconsideration the proceedings by which plaintiff acquired the Hamm, Cooper, Parker, Tolson, Rose and Bennett certificates, in accordance with the well-established principle that " • • • the validity of the order [of the Interstate Commerce Commission] must be determined upon evidence introduced before the Commission." *Louisville & Nashville Railroad Company* v. *United States,* 245 U.S. 463, 466. This principle requires that we give no consideration to matters not in the record before the Commission, but even were it proper for us to take into consideration matters such as those tendered by the Interstate Commerce Commission at the hearing before this Court, our conclusions as stated in conclusions of law 15 and 16 would not be different.

19. A permanent injunction should issue enjoining the enforcement of the provisions of the December 7, 1953, order as it applies to plaintiff's certificates bearing the numbers MC 89913 Sub. No. 1; MC 89913 Sub. No. 3; MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6.

[fol. 201] 20. No injunction should issue in connection with said order as it applies to plaintiff's certificate bearing the number MC 89913 Sub. No. 10.

/s/ Martin D. Van Oosterhout, United States Circuit Judge, /s/ Roy W. Harper, United States District Judge.

George H. Moore, United States District Judge, dissenting.

[fol. 202] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

Civil Action No. 10272 (1)

FRISCO TRANSPORTATION CO., Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*, Defendants.

NOTICE OF APPEAL BY AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., TO THE SUPREME COURT OF THE UNITED STATES—Filed October 4, 1957

I.

Notice is hereby given that the American Trucking Associations, Inc., its Regular Route Common Carrier Conference, Be-Mac Transport Company, Inc., Viking Freight Company, C. E. S. Truck Lines, Inc., L. A. Tucker Truck Lines, Inc., Consolidated Forwarding Company, Inc., and Campbell "Sixty-Six" Express, Inc., intervening defendants in the above-captioned proceeding, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on August 12, 1957, to the extent that it enjoins, suspends, annuls, vacates and sets aside the decision and order of the Interstate Commerce Commission entered December 7, 1953, in a proceeding bearing the principal caption No. MC-89913, *Frisco Transportation Company Extension—Joplin-Miami*, 62 M.C.C. 367, insofar as the Commission found and concluded that the certificates issued to Frisco Transportation Company in Docket No. [fol. 203] MC 89913, Sub-Nos. 1, 3, 5, and 6, were inadvertently issued, and that such certificates should be cancelled and new or amended certificates issued.

This appeal is taken pursuant to section 1253 and 2101 (b) of the Judicial Code, 28 U.S.C. Sec. 1253 and 2101(b).

II

The designation of the portions of the record to be certified by the Clerk for transmission to the Clerk of the Supreme Court of the United States is attached hereto.

III

The following questions are presented by this appeal:

Whether the District Court was in error in holding that the certificates involved were not issued by the Interstate Commerce Commission as the result of a clerical error?

2. Whether the Interstate Commerce Commission could have validly issued the certificates involved without afford-

ing the motor-carrier protestants who were parties to the antecedent proceedings before the Commission, notice and opportunity to protest?

3. Whether, in any event, in view of the provisions of Section 213(a)(1) of the Motor Carrier Act, 1935 (now Sec 5(2)(b) of the Interstate Commerce Act, 49 U.S.C.A. Sec. 5(a)(b), the Commission is empowered to authorize the performance of unrestricted motor-vehicle operations by railroads or their affiliates through the purchase of cer- [fol. 204] tificates theretofore issued to independent motor carriers?

Respectfully submitted,

La Tourette & Rebman, B. W. La Tourette, G. M. Rebman, 1230 Boatmen's Bank Building, St. Louis 2, Missouri, Wentworth E. Griffin, 1012 Baltimore Street, Kansas City, Missouri, Peter T. Beardsley, Fritz R. Kahn, 1424 Sixteenth Street, N.W., Washington 6, D.C., Attorneys for Appellants.

[fol. 205] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

Civil Action No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al., Defendants.

NOTICE OF APPEAL BY RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL., TO THE SUPREME COURT OF THE UNITED STATES—Filed October 8, 1957

I.

Notice is hereby given that the Railway Labor Executives' Association, the Brotherhood of Railway Trainmen

and the Order of Railway Conductors & Brakemen of America, intervening defendants in the above-captioned case, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on August 12, 1957, insofar as said final judgment decrees that the United States of America and its agency, the Interstate Commerce Commission, be and are enjoined from enforcing the second ordering paragraph of the order of the Commission entered on December 7, 1953, in a proceeding bearing the principal caption MC 89913, Sub. No. 1, Friseo Transportation Company Extension—Joplin-Miami, and sets aside, suspends, and annuls said second ordering paragraph.

This appeal is taken pursuant to Sections 1253 and 2101 (b) of the Judicial Code. (28 U.S.C. 1253 and 2101(b))

[fol. 206]

II.

In a notice of appeal to the United States Supreme Court filed in this case on October 4, 1957, other intervening defendants, the American Trucking Associations, Inc., et al., have requested the Clerk to certify and prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and have designated the items for inclusion therein.

The intervening defendants, the Railway Labor Executives' Association, et al., adopt such designation of record for purposes of appeal as their own and hereby incorporate it herein. In order to avoid sending two records to the Supreme Court covering the same items, the intervening defendants, whose notice of appeal is hereby given, state that they will rely on appeal on the transcript of record in this cause which the intervening defendants, American Trucking Associations, Inc., et al., have already requested be transmitted to the Clerk of the Supreme Court of the United States. The intervening defendants, the Railway Labor Executives' Association, et al., request that there also be included in the transcript to the Supreme Court this notice of appeal.

III.

The following questions are presented by this appeal:

1. Does the Interstate Commerce Commission have authority, after notice and hearing, to impose conditions on motor carrier certificates of a wholly owned subsidiary of a railroad for the purpose of ensuring that the operations of the subsidiary are auxiliary to or supplemental of [fol. 207] the parent railroad's train service under circumstances where:

(a) the operating rights represented by said certificates were acquired by the purchase of independent motor carriers subject to the approval of the Interstate Commerce Commission under Section 213 (now Section 5(2)) of the Interstate Commerce Act which permits agency approval of such a purchase only upon a finding that the parent railroad can use the motor carrier service to public advantage in its own operations;

(b) the Commission based its finding in acquisition proceedings under said section that the requirements of the statute were met because the applicant proposed to use the purchased operating authority to provide a coordinated rail-truck service;

(c) the Commission found in its opinion approving the purchase that the authority granted was subject to such further limitations or restrictions as the agency might thereafter find necessary to impose in order to ensure that the motor service be auxiliary to or supplementary of the train service of the parent railroad; and

(d) the reservation of authority made in the opinion approving the purchase was not inserted in the certificates issued pursuant thereto.

2. Does the Commission have authority under the circumstances enumerated in paragraph 1 above to impose conditions upon the certificates of a motor carrier subsidiary of a railroad in order to ensure that operations thereunder be auxiliary to or supplemental of the parent railroad's train service upon finding, after notice and hearing, that it had inadvertently omitted from said certificates

[fol. 208] a reservation of authority to subject the certificates to further limitations or restrictions.

3. Did the District Court err in concluding that the Commission's finding that the reservation of authority to impose further limitations or restrictions upon the motor carrier certificates involved in order to ensure that operations thereunder be auxiliary to or supplemental of the parent railroad's train service was omitted from the certificates through error is not supported by adequate evidence.

/s/ Carroll J. Donohue, 506 Olive Street, St. Louis 1, Missouri, Clarence M. Mulholland, 741 National Bank Building, Toledo 4, Ohio, Edward J. Hickey, Jr., James L. Highsaw, Jr., 620 Tower Building, Washington 5, D. C., Attorneys for Intervening Defendants, Railway Labor Executives' Association, et al.

Of Counsel: Husch, Eppenberger, Donohue, Elson & Jones, 506 Olive Street, St. Louis 1, Missouri, Mulholland, Robie & Hickey, 620 Tower Building, Washington 5, D. C.

[fol. 209] Certificate of Service (omitted in printing).

[fol. 210] [File endorsement omitted]

In the United States District Court
Eastern District of Missouri, Eastern Division

No. 10272(1)

Frisco Transportation Company, a corporation, Plaintiff,

v.

United States of America, et al., Defendants.

NOTICE OF APPEAL BY THE I.C.C. TO THE SUPREME COURT OF THE UNITED STATES—Filed October 10, 1957

I. Notice is hereby given that the Interstate Commerce Commission, a defendant in the above action, hereby appeals to the Supreme Court of the United States from the final judgment setting aside the order of the Commission, entered in this action on August 12, 1957.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101 (b).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint, filed May 20, 1955.
2. Answer of the United States, filed July 18, 1955.
3. Intervention of Interstate Commerce Commission, filed July 15, 1955.
4. Answer of Interstate Commerce Commission, filed July 15, 1955.
5. Motion for leave to intervene of Campbell "Sixty-Six" Express, Inc., filed September 19, 1955.
6. Answer of Campbell "Sixty-Six" Express, filed September 19, 1955.
7. Petition for leave to intervene of Be-Mac Transport Co., Inc., Viking Freight Company, C.E.S. Truck Lines, Inc., L. A. Tucker Lines, Inc., and Consolidated Forwarding Company, Inc., filed June 21, 1955.
8. Answer of Be-Mac Transport Co., Inc., Viking Freight Company, C.E.S. Truck Lines Inc., and L. A. Tucker Truck Lines, Inc., filed March 28, 1956.

[fol. 211] 9. Motion for leave to intervene of the American Trucking Associations, Inc., and its Regular Common Carrier Conference, filed July 19, 1955.

10. Answer of the American Trucking Associations, Inc., and its Regular Common Carrier Conference, filed July 19, 1955.

11. Motion for leave to intervene of the Railway Labor Executives' Association and the Brotherhood of Railroad Trainmen and the Order of Railway Conductors & Brakemen of America, filed August 22, 1955.

12. Answer of the Railway Labor Executives' Association and the Brotherhood of Railroad Trainmen and the Order of Railway Conductors & Brakemen of America, filed August 22, 1955.

13. Amended Answer of Interstate Commerce Commission, filed April 2, 1956.

14. Amended Answer of United States, filed March 26, 1956.

15. Order on petitions to intervene, filed March 14, 1956.

16. Order convening three-judge Court, filed September 30, 1955.

17. Amended Order convening three-judge Court, filed July 14, 1956.

18. Opinion, including dissenting opinion, dated June 28, 1957.

19. Judgment entered August 12, 1957.

20. The record before the Interstate Commerce Commission and the report and order of the Commission of December 7, 1953, being plaintiff's exhibits 1 and 2 introduced at the hearing on June 13, 1956.

21. Memoranda of the Interstate Commerce Commission, being Government exhibits 1 through 8 introduced at the hearing on June 19, 1956.

22. This notice of appeal.

III. The following question is presented by this appeal:

May the Interstate Commerce Commission, after notice and hearing, modify a railroad-affiliated mo-

tor carrier's certificate so as to make its operation [fol. 212] auxiliary to and supplemental of the rail service, where the certificate contains no reservation of power to impose such restrictions, but where such reservation was expressly made in the findings in the Commission's report approving the acquisition of such rights.

Robert W. Ginnane, General Counsel, Charlie H. Johns, Jr., Associate General Counsel, Attorneys for Interstate Commerce Commission, Washington 25, D. C.

[fol. 213] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 214] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 215] SUPREME COURT OF THE UNITED STATES

Nos. 636, 637, and 651, October Term, 1957

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., Appellants,

v.

FRISCO TRANSPORTATION COMPANY;

RAILWAY LABOR EXECUTIVES' ASSOCIATION ET AL., Appellants,

v.

FRISCO TRANSPORTATION COMPANY; and

INTERSTATE COMMERCE COMMISSION, Appellant,

v.

FRISCO TRANSPORTATION COMPANY

Appeals from the United States District Court for the Eastern District of Missouri.

ORDER NOTING PROBABLE JURISDICTION—February 3, 1958

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours allowed for oral argument.

[fol. 216] PLAINTIFF'S EXHIBIT 1

INTERSTATE COMMERCE COMMISSION
Washington 25

I, HAROLD D. McCOY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of the following:

Order of the Commission, entered January 4, 1945;

Report on reconsideration proposed by Examiner David Waters, served February 8, 1945;

Order of the Commission, entered May 28, 1945;

Order of the Commission, entered March 8, 1945;

Transcript of the stenographer's notes of hearing held April 8 and April 9, 1946 at Kansas City, Missouri, and Exhibits 1-A to 16-A, both inclusive, filed at said hearing;

Report and order on further hearing recommended by William T. Croft and Beverley S. Simms, Examiners, served May 17, 1948;

Report and order of the Commission on further hearing, filed and entered October 22, 1951;

Order of the Commission, entered November 6, 1951;

Order of the Commission, entered November 26, 1951; and

Order of the Commission, entered April 4, 1955,

in No. MC-89913 (Sub-No. 1), Frisco Transportation Company Extension—Joplin-Miami, et al, the originals of which are now on file and of record in the office of said Commission.

[fol. 217] IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 15th day of August, A. D. 1955.

/s/ HAROLD D. McCOY
Secretary of the Interstate
Commerce Commission.

(SEAL)

[fol. 218] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 4th day of January, A. D. 1945.

No. MC 89913 (Sub No. 1)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

No. MC 89913 (Sub No. 2)
FRISCO TRANSPORTATION COMPANY EXTENSION—
HUGO TO PARIS

No. MC 89913 (Sub No. 3)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-CARTHAGE

No. MC 89913 (Sub No. 5)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-BLYTHEVILLE

No. MC 89913 (Sub No. 6)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-WALNUT RIDGE

No. MC 89913 (Sub No. 10)
FRISCO TRANSPORTATION COMPANY EXTENSION—
BLYTHEVILLE-LAKE CITY

No. MC-F-578
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH D. COOPER

No. MC-F-618
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOHN HAMM

No. MC-F-619
FRISCO TRANSPORTATION COMPANY—PURCHASE—
J. A. ROSE

No. MC-F-678
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH W. PARKER

No. MC-F-679
FRISCO TRANSPORTATION COMPANY—PURCHASE—
LOUIS TOLSON

Upon consideration of the records in the above-entitled proceedings, and good cause appearing therefor:

It is ordered, That the said proceedings be, and they are hereby, reopened for reconsideration;

It is further ordered, That an examiner's proposed report on reconsideration be served on the parties;

And it is further ordered, That, if any party to the proceedings desires a further hearing before the issues are reconsidered by the said Division, a petition for further hearing may be filed before the expiration of the time for filing exceptions to the proposed report of the examiner.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

[fol. 219] INTERSTATE COMMERCE COMMISSION
Served Feb 8—1945

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all parties in interest, within 20 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. If exceptions are filed, replies to exceptions may be filed within 10 days after the final date for filing of exceptions

No. MC-89913 (Sub-No. 1)[1]

FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

Submitted ..... Decided .....

On reconsideration, findings proposed that the Commission impose specific conditions in certain authorizations of Frisco Transportation Company in order to insure the performance of service which is auxiliary to, or supplemental of, the rail service of its parent railroad.

Appearances shown in prior reports, with addition of: Frank L. Mulholland, Clarence M. Mulholland, and Willard H. McEwen for intervener.

REPORT ON RECONSIDERATION PROPOSED BY
EXAMINER DAVID WATERS

In No. MC-C-293, *Campbell Sixty-Six Express, Inc.*, v. *Frisco Transportation Company*, —— M.C.-C. ——, decided August 1, 1944, hereafter called the *Campbell case*, the Commission, division 5, found that certain acquisitions of motor common-carrier operations by Frisco Transportation Company[2] were authorized and approved in order that the Transportation Company could perform only that character of motor-carrier service which is strictly auxiliary to, or supplemental of, the rail service of the Railway; that the Transportation Company was not authorized to, and did not acquire authority to, perform direct motor-carrier service for the public; and that the performance of such service by the Transportation Company had been unauthorized under the acquisitions and should be discontinued.

[1] This report embraces 11 proceedings as described in appendix A hereto, all of which involve purchases and extensions of operation by Frisco Transportation Company.

[2] Frisco Transportation Company, of St. Louis, Mo., is a wholly-owned subsidiary of St. Louis-San Francisco Railway Company (J. M. Kurn and Frank A. Thompson, Trustees), herein called the Transportation Company and the Railway, respectively.

[fol. 220] No order was entered in the *Campbell case* but the division indicated that certain proceedings would be reopened for reconsideration for the purpose of determining what, if any, conditions or restrictions should be imposed in the certificates to remove all doubt about the character of operations which the Transportation Company was authorized to acquire and in which it is authorized to engage. In fulfillment of this purpose the division, on its own motion, opened the six certificate proceedings listed in footnote 3 for reconsideration as provided in the attached order of January 4, 1945. The Railway Labor Executives' Association was permitted to intervene in these proceedings by the division's order of November 21, 1944.

The certificate proceedings were assigned to cover the operating rights which the Transportation Company was authorized to purchase from six independent motor common carriers. All of the purchases were authorized subject to a condition reading substantially as follows: "The authority herein granted is subject to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad, and shall not unduly restrain competition". This condition was inadvertently omitted from the certificates issued in five certificate proceedings, No. MC-89913 (Sub-Nos. 1, 2, 3, 5, and 6), which were assigned to cover five of the purchases. In the exercise of the powers vested in section 5(9) of the Interstate Commerce Act (formerly vested in section 213(d) of the Motor Carrier Act, 1935), the division has reopened the finance proceedings,[4] in which these five purchases were authorized, for

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[3] No. MC-89913 (Sub-Nos. 1, 2, 3, 5, 6, and 10).

[4] No. MC-F-578, *Frisco Transp. Co.—Purchase—Hamm*, 15 M.C.C. 320
No. MC-F-618, *Frisco Transp. Co.—Purchase—Cooper*, 15 M.C.C. 317
No. MC-F-619, *Frisco Transp. Co.—Purchase—Rose*, 15 M.C.C. 323
Nos. MC-F-678 and MC-F-679, *Frisco Transp. Co.—Purchase—Parker*, 25 M.C.C. 96.

reconsideration as provided in the order of January 4, 1945. The division did not reopen the remaining finance proceeding[5] as the condition was included in the certificate issued in No. MC-89913 (Sub-No. 10) to cover the sixth purchase.

The division's order of January 4, 1945, provides that an examiner's proposed report on reconsideration shall be served on the parties and that, if any party to the proceedings desires a further hearing, an appropriate petition shall be filed before the expiration of the time for filing exceptions to the proposed report of the examiner. The examiner's proposed report, therefore, is designed to bring the issues to the attention of the parties and to furnish a basis for such further action as the division may deem appro-
[fol. 221] priate. It will be prepared on the basis of the present evidence of record and in the light of the principles laid down by the Commission in similar rail-and-motor cases.

In the leading case, *Kansas City S. Transport Co. Inc., Com. Car. Application,* 28 M.C.C. 5, decided January 24, 1941, the Commission considered and approved certain conditions for imposition in certificates issued to railroads and their motor subsidiaries in order to assure the performance of coordinated rail-and-motor service. The purpose of the conditions there imposed was to limit the motor-carrier service to that which is auxiliary to, or supplemental of, the rail service and to prevent the motor subsidiary from engaging in motor-carrier operations unconnected with any rail service. These conditions, designated 1, 2, 3, 4, and 5, have since been imposed in numerous certificates authorizing the performance of coordinated rail-and-motor service.

Condition 1 reads substantially as follows:

1. The service by motor vehicle to be performed by (the designated motor carrier) shall be limited to service which is auxiliary to, or supplemental of rail service of (the designated railroad).

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[5] No. MC-F-1037, *Frisco Transportation Company—Purchase—T. N. Bennett,* 35 M.C.C. 802.

This condition described the character of the service which the motor carrier may perform, restricting its service by motor vehicle to that which is auxiliary to, or supplemental of, the rail service of its affiliated railroad. As explained in the *Campbell case*, this condition specified the type of service that it was contemplated the Transportation Company would perform under the operating rights which it was authorized to purchase in the finance proceedings listed in footnotes 4 and 5. There was no need shown in any of these proceedings for another operator to enter a new field of service and furnish the same type of service as was being supplied by the independent motor common carriers already engaged in the field. While the Transportation Company may have indicated its desire "to step in the shoes" of its predecessors and continue their operations without any restrictions, it was not authorized to do so under the findings approving the various purchases of their operating rights. In each of the finance proceedings listed in footnotes 4 and 5, the findings provide that the respective purchases will be consistent with the public interest, will promote the public interest by enabling the Railway to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition; and that the authority granted is subject to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the Railway, and shall not unduly restrain competition.

These findings plainly disclose an intent to authorize the Transportation Company to perform a service by motor vehicle which would be auxiliary or supplementary to the rail service of the Railway. Furthermore, this intent is confirmed by the discussion preceding the respective find-
[fol. 222] ings wherein the proposed operations are described as a means for developing coordinated rail-truck service with a view to improving the Railway's service to the Public. No other type of service is mentioned in these discussions and hence, there is no basis for inferring that the findings authorize any other type of service than that discussed. The fact that the Commission reserved the

power to impose future limitations, restrictions, or modifications in order to insure the performance of auxiliary or supplementary service certainly presupposes the authorization of this type of service only. This conclusion remains true even though this authorized type of service was not specifically described as auxiliary or supplementary in the language of condition 1 in the findings in the finance proceedings. To remove any doubt as to the type of service which the Transportation Company is authorized to perform, the Commission should impose appropriate conditions pursuant to its reservation of power to impose future limitations, restrictions, or modifications.

Condition 1 is the fundamental condition which specifically described the type of service authorized in all of these proceedings and hence, should be imposed therein. The scope of this authorized service need not be defined here as that has been done in the *Campbell case* and other cases there cited. Suffice to say that this condition limits the service to be performed by motor vehicle to the transportation of the rail traffic of the Railway, that is, rail shipments moving on rail bills of lading and at rail rates.

Condition 2 reads substantially as follows:

> 2. (The designated motor carrier) shall not serve any point not a station on the rail line of (the designated railroad).

This condition limits the motor carrier's service to rail points on the line of its affiliated railroad as distinguished from rail points on other railroads and from non-rail points. Under the purchases approved in the finance proceedings listed in footnotes 4 and 5, the Transportation Company is authorized to serve certain intermediate and off-route points. The only non-rail point at which service is specifically authorized is Dyess, Ark., a small community 7 miles from the nearest station of the Railway. See *Frisco Transp. Co.—Purchase—Parker,* 25 M.C.C. 96. In order to permit service at this non-rail point, condition 2 should be modified for imposition in the applicable proceedings, Nos. MC-F-678 and MC-89913 (Sub-No. 5). No modification appears to be necessary in the other proceedings and the condition should be imposed therein in its usual form.

Condition 3 has individual application depending on the particular circumstances involved in each proceeding and hence, requires detailed discussion. Such discussion will be deferred until conditions 4 and 5 have been considered.

Conditions 4 and 5 are generally worded as follows:

[fol. 223] 4. All contractual arrangements between (the designated motor carrier) and (the designated railroad) shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, may find it necessary to impose in order to restrict the operation of (the designated motor carrier) to service which is auxiliary to, or supplemental of, rail service of (the designated railroad).

These two conditions are self-explanatory. Under condition 4 the Commission reserves the right to review and revise all contractual arrangements between the motor carrier and its affiliated railroad. This condition has uniform application and therefore, should be imposed in all of the proceedings here considered. Under condition 5 the Commission may impose such further specific conditions in the future as may be necessary to restrict the operation to the authorized type of service. As previously indicated, this condition is contained in substance in the findings in all six finance proceedings listed in footnotes 4 and 5 and in specific terms in the certificate issued in No. MC-89913 (Sub-No. 10). This condition has uniform application in all of the proceedings here considered and hence, should be imposed therein.

Condition 3 has been imposed in numerous rail-and-motor cases in order to insure the performance of the auxiliary or supplementary type of service by means of restrictions on the physical movement of the shipments. These restrictions have generally taken two forms, (1) the "rail-haul" form which requires that shipments shall be given a prior or subsequent haul by rail in addition to a haul by motor vehicle and (2) the "key-point" form which prohibits the

movement of shipments by motor vehicle between key points that are normally served by rail. Both forms have the same objective as they are designed to insure that shipments shall be transported by the most economical and efficient method, generally speaking, by rail for long distances and by motor vehicle for short distances.

The "rail-haul" condition 3 is as follows:

> 3. Shipments transported by (the designated motor carrier) shall be limited to those which it receives from or delivers to (the designated railroad) under a through bill of lading covering, in addition to movement by (the designated motor carrier), a prior or subsequent movement by rail.

The "key-point" condition 3 is as follows:

> 3. No shipments shall be transported by (the designated motor carrier) as a common carrier by motor vehicle between any of the following points, or through or to or from more than one of said points: (specified key points).

[fol. 224] In determining which of these two forms should be imposed, consideration must be given to the circumstances surrounding the particular operation. Accordingly, the facts as to each operation will be discussed in detail under separate captions.

Joplin-Miami and Joplin-Carthage Operations

These two operations will be considered together as they involve connecting motor routes. Operations between Joplin, Mo., and Miami, Okla., and between Joplin and Carthage, Mo., were approved for purchase by the Transportation Company in Nos. MC-F-618 and MC-F-578, respectively and, for certificate purposes, were assigned in turn No. MC-89913 (Sub-Nos. 1 and 3). The former purchase covers a route between Miami and Joplin over U. S. Highways 69, 166, and 66, and the latter, a route between Joplin and Carthage over U. S. Highway 66. These routes generally parallel branch lines of the Railway extending from Miami through Quapaw, Okla., and Baxter Springs, Kans.,

to Joplin, and thence to Carthage, including a loop line from Quapaw through Picher, Okla., to Baxter Springs, a total distance of approximately 60 miles. Connections, where less-than-carload freight can be interchanged, are made with main lines of the Railway at four points, as follows: At Miami with lines extending southwest to Tulsa and Oklahoma City, Okla., and, Dallas and Fort Worth, Tex.; at Baxter Springs with lines extending north to Kansas City, Mo., and west to Wichita, Kans.; at Joplin with another line extending north to Kansas City; and at Carthage with lines extending west to Wichita, east to St. Louis and Memphis, Tenn., and south to Fort Smith, Ark., and Paris, Tex. The two routes, combined, traverse portions of three States, southwestern Missouri, southeastern Kansas, and northeastern Oklahoma, generally known as the "Tri-State area". The principal industry in this area is mining. Joplin, population 37,000, is the largest city and the main distributing center in the area. Other important points on these routes have smaller populations, approximately as follows: Carthage 11,000, Miami 8,000, Webb City, Mo., 7,000, Picher 6,000, Baxter Springs 5,000, and Galena, Kans. 4,000.

At the time operating rights over these two motor routes were purchased, the Transportation Company proposed to develop coordinated rail-and-motor service and to correlate truck schedules with through rail schedules. This plan was designed to eliminate the use of way-freight trains in the transportation of less-than-carload freight over the branch lines between Carthage, Joplin, Baxter Springs, and Miami. Through freight trains would set out and pick up merchandise cars containing through or long-haul shipments at the break-bulk points of Carthage, Joplin, and Baxter Springs, and possibly Miami. Trucks would then transport these shipments to and from points on both motor routes. Trucks also would transport local or short-haul shipments moving solely between points on one or both of the motor routes. Under this plan, through traffic would move in coordinated rail-and-motor service and local traffic in substituted motor-for-rail service.

[fol. 225] As found in the *Campbell case*, the Transportation Company has not been limiting its operations to the

performance of motor-carrier service that is strictly auxiliary to, or supplemental of, the rail service of the Railway, but has engaged in direct motor-carrier service to the public. Thus, it has gone beyond its original plan and expanded its operations in a manner not contemplated at the time its purchases of rights over these two routes were approved.

Carthage, Joplin, Baxter Springs, and Miami are the break-bulk points on these two routes. If these four points were designated as key points, the routes would be divided into three short segments as follows: Carthage-Joplin 18 miles, Joplin-Baxter Springs 17 miles, and Baxter Springs-Miami 14 miles. Under such a "key-point" condition, shipments could not be transported by motor vehicle between any of the key points or through or to or from more than one key point. Local or short-haul shipments could not be transported by motor vehicle between any of the key points such as Carthage and Joplin and hence, these shipments would necessarily move by rail in way-freight train service. Through or long-haul shipments, moving from and to the key points, would normally move by rail from and to each key point. As a result, one or more through merchandise cars would have to be operated from and to the four key points whereas the operation of one such car from and to a principal key point, such as Joplin, might be more economical and efficient if motor vehicle service could be used beyond the principal key point to serve the other key points. Since "key-point" condition 3 would require the operation of way-freight train service between the four key points and the use of through merchandise cars from and to each key point, it is deemed inappropriate for application to these two routes.

Under "rail-haul" condition 3 through or long-haul shipments could be transported with greater flexibility as through merchandise cars could be operated from and to a single key point in keeping with the requirement of a prior or subsequent movement by rail. Local or short-haul shipments would not receive such a movement unless way-freight train service was operated between the four key points. The "rail-haul" condition, therefore, would permit through or long-haul traffic to move in coordinated rail-and-

motor service but would not permit local or short-haul traffic to move in substituted motor-for-rail service. The latter service is important because much of the local traffic over these two routes moves in interstate commerce since they traverse three States. This substituted service should be permitted in view of the efficiencies and economies that would result from the substitution of trucks for way-freight train service over the short distances here involved. The Transportation Company should be permitted to perform substituted, as well as coordinated, service over these two routes. Accordingly the Commission should impose "rail-haul" condition 3 requiring a prior or subsequent rail haul, except on local shipments moving solely between Miami, Joplin, and Carthage and intermediate points.

[fol. 226] HUGO TO PARIS OPERATION

The Transportation Company was authorized to purchase this operation in No. MC-F-619 and a certificate in respect thereof was issued in No. MC-89913 (Sub-No. 2). This operation involves a route from Hugo, Okla., to Paris, over U. S. Highway 271, 25 miles. Hugo is the junction point of four lines of the Railway extending as follows: South to Paris, north to Fort Smith, and Springfield, Mo., east to Hope, Ark., and west to Madill and Ardmore, Okla. This motor route parallels the southern rail line from Hugo to Paris and does not connect with any other motor route of the Transportation Company. Under this purchase authority was acquired to operate in only one direction, that is, southbound from Hugo to Paris, with no service at intermediate points. Subsequently, in No. MC-89913, authority was obtained northbound from Paris to Hugo, including the right to serve all intermediate points in both directions, upon a showing of public convenience and necessity. These subsequent operations were authorized without restriction as to the type of service to be performed whereas the prior operation from Hugo to Paris was made subject to such further limitations or restrictions as the Commission might find necessary to impose in order to insure that the service shall be auxiliary or supplementary to rail service of the Railway.

This presents the question whether any limitations or restrictions need be imposed on the southbound operation from Hugo to Paris. Through or long-haul shipments reach Hugo by rail and thence move to Paris by truck. These shipments receive a prior movement by rail and therefore, move in coordinated rail-and-motor service. Local or short-haul shipments move from Hugo to Paris by truck instead of by way-freight trains, that is, in substituted motor-for-rail service. Considering the fact that this route is disconnected from the other routes of the Transportation Company and that both classes of traffic move over it in approved types of service, there appears to be no present necessity for the imposition of condition 3. This conclusion does not preclude the imposition of conditions 1, 2, 4 and 5 as they have uniform application and, consequently, should be imposed on this operation.

Memphis-Blytheville Operation

The Transportation Company was authorized to purchase this operation in No. MC-F-678 and a certificate in respect thereof was issued in No. MC-89913 (Sub-No. 5). The purchased rights authorize operation between Memphis and Blytheville, Ark., over U. S. Highway 61, with service at all intermediate points and the off-route points of Armorel, Dyess, Keiser, Marie, and Victoria, Ark. All of these points, except Dyess, are stations on the Railway. The purchase of these rights was approved subject to the imposition of future limitations, restrictions, or modifications in order to insure that the service shall be auxiliary or supplementary to the rail service of the Railway.

This motor route generally parallels the Memphis-St. Louis line of the Railway between Memphis and Blytheville, approximately 70 miles. At Blytheville, the route [fol. 227] connects with another motor route which parallels the rail line between Blytheville and St. Louis, approximately 235 miles. The latter route[4] is subject to a "key-point condition 3" designating St. Louis, Chaffee, and Hayti, Mo., and Blytheville as key points. At Memphis,

[4] As authorized in No. MC-89913 (Sub-No. 15), *Frisco Transp. Co. Extension—Missouri-Arkansas*, 42 M.C.C. 219.

connections are made with three other motor routes extending to Walnut Ridge,[7] Ark., Jonesboro,[8] and Columbus,[9] Miss. Operations over the Jonesboro and Columbus routes was authorized without condition 3 restrictions, whereas operation over the Walnut Ridge route was made subject to the imposition of future conditions in order to insure that the service shall be auxiliary or supplementary to the rail service of the Railway.

As heretofore stated, the Memphis-Blytheville route connects at Blytheville with the Blytheville-St. Louis route to form a through motor route between Memphis and St. Louis. Blytheville is a key point for traffic moving over the northern segment of this through route. Similarly, it should be a key point for traffic moving over the southern segment. Under a "key-point" condition 3 designating Memphis and Blytheville as key points, shipments between these key points would move by rail in through merchandise cars. Through or long-haul shipments would move by rail to Memphis or Blytheville, and thence by truck to the intermediate and off-route points in coordinated rail-and-motor service. Local or short-haul shipments would usually move in intrastate commerce as all points on this route are in Arkansas, except Memphis. Local shipments between Memphis and Arkansas points, other than Blytheville, would move by truck instead of by way-freight trains and hence, in substituted motor-for-rail service. Since this "key-point" condition 3 will permit the movement of both classes of traffic in approved types of service, it should be imposed on the operation between Memphis and Blytheville.

Memphis-Walnut Ridge Operation

The Transportation Company was authorized to purchase this operation in No. MC-F-679 and a certificate in

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[7] Purchase thereof was approved in No. MC-F-679, as reported in *Frisco Transp. Co.—Purchase—Parker*, 25 M.C.C. 96.

[8] Purchase thereof was approved in No. MC-F-941, as reported in *Frisco Transp. Co.—Purchase—Reddish*, 35 M.C.C. 132.

[9] Purchase thereof was approved in No. MC-F-2022, *Frisco Transportation Company—Purchase—William B. Mayers*, 38 M.C.C. 820.

respect thereof was issued in No. MC-89913 (Sub-No. 6). The operation covers a route between Memphis and Walnut Ridge over U. S. Highways 61, 63, and 67, through Turrell, [fol. 228] Marked Tree, Jonesboro, and Hoxie, Ark., approximately 92 miles. Service is limited to the transportation of (1) general commodities between Memphis and Walnut Ridge only, and (2) soap and soap products at intermediate points between Walnut Ridge and Marked Tree, including Marked Tree, when moving southbound only. Purchase of this operation was authorized subject to the imposition of future limitations or restrictions in order to insure that the service shall be auxiliary or supplementary to the rail service of the Railway.

At Memphis, this route connects with other motor routes extending to Jonesboro,[8] Columbus,[9] and Blytheville.[10] The Jonesboro and Columbus routes are not subject to any condition 3 restrictions. As heretofore indicated, the Memphis-Blytheville route should be made subject to a "key-point" condition 3, designating Memphis and Blytheville as key points. At Walnut Ridge, the route connects with a route extending north to Datto, Ark., from which point other routes extend to Cape Girardeau and Caruthersville, Mo. The Walnut Ridge-Datto route[11] is subject to "rail-haul" condition 3. The routes[8] between Datton, on the one hand, and Cape Girardeau and Caruthersville, on the other, are subject to a "key-point" condition 3, prohibiting movements by motor vehicle between St. Louis, Chaffee, Hayti, and Blytheville, or through or to or from more than one of these key points.

Service at intermediate points between Walnut Ridge and Marked Tree merely involves a special-commodity operation which does not warrant the imposition of condition 3. However, the general-commodity service between the terminals, Memphis and Walnut Ridge, presents a question as to the imposition of this condition. The "key-point" form of condition 3 is not appropriate as Walnut Ridge,

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[10] Purchase thereof was approved in No. MC-F-678, *Frisco Transp. Co.—Purchase—Parker*, 25 M.C.C. 96.

[11] As authorized in No. MC-89913 (Sub-No. 4), *Frisco Transp. Co. Extension—Lake City, Ark.*, 42 M.C.C. 677.

population 2,000 is not a break-bulk point on the Railway. The "rail-haul" form of condition 3 would permit the transportation of through or long-haul shipments between Memphis and Walnut Ridge as they would receive a prior or subsequent movement by rail beyond one or the other of these terminals, in addition to a motor vehicle movement between the terminals. However, this form of condition 3 would prohibit the transportation of local or short-haul shipments moving solely between Memphis and Walnut Ridge as they would not normally receive a movement by rail. In order to permit the transportation of such shipments by trucks instead of by way-freight trains, condition 3 should be modified so as to authorize substituted motor-for-rail service between these terminals. Under "rail-haul" condition 3, as thus modified, both classes of traffic could be transported between Memphis and Walnut Ridge in approved types of service. Therefore, the Commission should impose "rail-haul" condition 3 requiring a prior or subsequent rail haul, except on local shipments moving solely between Memphis and Walnut Ridge.

[fol. 229] BLYTHEVILLE-LAKE CITY OPERATION

The Transportation Company was authorized to purchase this operation in No. MC-F-1037 and a certificate in respect thereof was issued in No. MC-89913 (Sub-No. 10). The purchased rights authorize operation between Blytheville and Lake City, Ark., with service at all intermediate points, over Arkansas Highway 18. This motor route parallels a branch line of the Railway, approximately 39 miles. This operation was authorized subject to the imposition of future limitations or restrictions in order to insure that the service shall be auxiliary or supplementary to the rail service of the Railway.

At the eastern terminal of Blytheville, this route connects with two other motor routes, one extending north to St. Louis and the other south to Memphis. The St. Louis-Blytheville route is subject to "key-point" condition 3 designating St. Louis, Chaffee, Hayti, and Blytheville as key points. As heretofore indicated the Memphis-Blytheville route should be made subject to a similar condition designating Memphis and Blytheville as key points. At the inter-

mediate point of Leachville, Ark., 25 miles west of Blytheville, connection is made with a motor route extending north to Sikeston, Mo., a point on the St. Louis-Blytheville route. The Leachville-Sikeston route[8] is subject to a "key-point" condition 3, designating St. Louis, Chaffee, Hayti, and Blytheville as key points. At the western terminal of Lake City, connection is made with a motor route to Nettleton, Ark., at which point a further connection is made with the Memphis-Jonesboro route.[9] The Lake City-Nettleton route[10] is subject to "rail-haul" condition 3 as modified to cover transit shipments. Summing up, the Blytheville-Lake City route connects at Blytheville and Leachville with routes subject to "key-point" condition 3 and at Lake City with a route subject to "rail-haul" condition 3.

The Transportation Company acquired this route between Blytheville and Lake City as a link in a proposed "short-cut" motor route between Blytheville and Jonesboro. Operation over this "short-cut" route was intended to be coordinated with through-freight train service at the break-bulk points of Blytheville and Jonesboro. It was contemplated that trucks would be used in lieu of way-freight train service over branch lines between Blytheville, Leachville, Lake City, Nettleton, and Jonesboro, and in lieu of through-freight train service over circuitous main lines between Blytheville, Turrell, Nettleton, and Jonesboro. The "short-cut" motor route consists of three segments which were authorized in three separate proceedings. With respect to the Blytheville-Lake City segment, 39 miles, no form of condition 3 was specifically imposed when this purchase was approved. The Lake City-Nettleton segment, 12 miles, was made subject to "rail-haul" condition 3 as modified to cover transit shipments. The Nettleton-Jonesboro segment, 4 miles, was authorized as part of the Memphis-Jonesboro route[9] without any condition 3 restrictions.

This situation presents some question as to what form of condition 3 should be imposed on the Blytheville-Lake City route. Local or short-haul shipments would generally move between points in Arkansas in intrastate commerce [fol. 230] and hence, need not be considered. Through or long-haul shipments would constitute practically all of the interstate traffic over the route.

Considering the "key-point" form of condition 3, Blytheville is a logical key point but Lake City, population 760, is not. Jonesboro, population 12,000, might be designated as a key point together with Blytheville. However, a condition designating Blytheville and Jonesboro as key points would contravene the primary purpose of the operation as it would prohibit the transportation of shipments by motor vehicle between these two points. Such shipments would then have to move by rail over branch lines through Lake City or over circuitous main lines through Turrell. Therefore, a "key-point" condition 3 is considered inappropriate for imposition on this operation.

The "rail-haul" form of condition 3 would not prohibit the transportation of shipments by motor vehicle between Blytheville and Jonesboro or any intermediate point but would merely require that such shipments receive a prior or subsequent movement by rail. Through or long-haul shipments would generally receive such a movement beyond either Blytheville or Jonesboro in the course of their transportation in interstate commerce. Consequently, "rail-haul" condition 3 is deemed appropriate for imposition on this operation. In the interest of uniformity, this condition should be modified to cover transit shipments in the same manner as condition 3 applicable to the connecting route between Lake City and Nettleton.

Proposed Findings

In Nos. MC-F-578, MC-F-618, MC-F-619, MC-F-678, and MC-F-679, the Commission, division 5, should find, on reconsideration, that its approval of the purchases of the considered operating rights by Frisco Transportation Company should be subject to the conditions specified in appendix B hereto.

In Nos. MC-89913 (Sub-No. 1), MC-89913 (Sub-No. 2), MC-89913 (Sub-No. 3), MC-89913 (Sub-No. 5), and MC-89913 (Sub-No. 6), the Commission, division 5, should find, on reconsideration, that the certificates of public convenience and necessity heretofore inadvertently issued to Frisco Transportation Company should be canceled; and that appropriate certificates containing the conditions specified in appendix B should be issued in lieu thereof.

In Nos. MC-89913 (Sub-No. 10), the Commission, division 5, should find, on reconsideration, that the conditions specified in appendix B should be imposed in the certificate heretofore issued to Frisco Transportation Company; that in all other respects the provisions of that certificate should remain in full force and effect; and that an amended certificate giving effect to these findings should be issued to Frisco Transportation Company.

An appropriate order should be entered.

[fol. 231] No. MC-89913 (Sub-No. 1)

APPENDIX A

No. MC-89913 (Sub-No. 1)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

No. MC-89913 (Sub-No. 2)
FRISCO TRANSPORTATION COMPANY EXTENSION—
HUGO TO PARIS

No. MC-89913 (Sub-No. 3)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-CARTHAGE

No. MC-89913 (Sub-No. 5)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-BLYTHEVILLE

No. MC-89913 (Sub-No. 6)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-WALNUT RIDGE

No. MC-89913 (Sub-No. 10)
FRISCO TRANSPORTATION COMPANY EXTENSION—
BLYTHEVILLE-LAKE CITY

No. MC-F-578
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH D. COOPER

No. MC-F-618
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOHN HAMM

No. MC-F-619
FRISCO TRANSPORTATION COMPANY—PURCHASE—
J. A. ROSE

No. MC-F-678
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH W. PARKER

No. MC-F-679
FRISCO TRANSPORTATION COMPANY—PURCHASE—
LOUIS TOLSON

[fol. 232] No. MC-89913 (Sub-No. 1)

APPENDIX B

Conditions 1, 2, 4, and 5 to be imposed in Nos. MC-F-578, MC-F-618, MC-F-619, MC-F-678, and MC-F-679, and in Nos. MC-89913 (Sub-No. 1), MC-89913 (Sub-No. 2), MC-89913 (Sub-No. 3), MC-89913 (Sub-No. 5), MC-89913 (Sub-No. 6), and MC-89913 (Sub-No. 10), except as otherwise noted.

1. The service by motor vehicle to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, rail service of St. Louis-San Francisco Railway Company (J. M. Kurn and Frank A. Thompson, Trustees), hereinafter called the Railway.

2. Frisco Transportation Company, hereinafter called the Transportation Company, shall not serve any point not a station on the rail line of the Railway.

Exception: In Nos. MC-F-678 and MC-89913 (Sub-No. 5), the Transportation Company is authorized to serve the non-rail point of Dyess, Ark.

4. All contractual arrangements between the Transportation Company and the Railway shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, may find it necessary to impose in order to restrict the

operations of the Transportation Company to service which is auxiliary to, or supplemental of, rail service of the Railway.

Condition 3 to be imposed in the following proceedings:

Nos. MC-F-618 and MC-89913 (Sub-No. 1)

3. Shipments transported by the Transportation Company shall be limited to those which it receives from or delivers to the Railway under a through bill of lading covering, in addition to a movement by the Transportation Company in line-haul motor-carrier service, a prior or subsequent movement by the Railway in line-haul rail service.

Exception: The foregoing condition 3 will not apply to local shipments moving solely between Joplin, Mo., and Miami, Okla., and intermediate points, over the route authorized herein.

Nos. MC-F-578 and MC-89913 (Sub-No. 3)

3. Shipments transported by the Transportation Company shall be limited to those which it receives from or delivers to the Railway under a through bill of lading covering, in addition to a movement by the Transportation Company in line-haul motor-carrier service, a prior or subsequent movement by the Railway in line-haul rail service. [fol. 233] Exceptions: The foregoing condition 3 will not apply to local shipments moving solely between Joplin and Carthage, Mo., and intermediate points, over the route authorized herein.

Nos. MC-F-678 and MC-89913 (Sub-No. 5)

3. No shipments shall be transported by the Transportation Company as a common carrier by motor vehicle between Memphis, Tenn., and Blytheville, Ark., or through or to or from more than one of said points.

Nos. MC-F-679 and MC-89913 (Sub-No. 6)

3. Shipments transported by the Transportation Company shall be limited to those which it receives from or delivers to the Railway under a through bill of lading cov-

ering, in addition to a movement by the Transportation Company in line-haul motor-carrier service, a prior or subsequent movement by the Railway in line-haul rail service.

Exception: The foregoing condition 3 will not apply to local shipments moving solely between Memphis, Tenn., and Walnut Ridge, Ark., over the route authorized herein.

No. MC-89913 (Sub-No. 10)

3. Shipments transported by the Transportation Company shall be limited to those which it receives from or delivers to the Railway under a through bill of lading covering, in addition to a movement by the Transportation Company in line-haul motor carrier service, a prior or subsequent movement by the Railway in line-haul rail service, and those which the Transportation Company transports as parts of through shipments prior or subsequent to movement by the Railway under appropriate transit rules.

[fol. 234] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 28th day of May, A. D., 1945

No. MC 89913 (Sub No. 1)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

No. MC 89913 (Sub No. 2)
FRISCO TRANSPORTATION COMPANY EXTENSION—
HUGO TO PARIS

No. MC 89913 (Sub No. 3)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-CARTHAGE

No. MC 89913 (Sub No. 5)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-BLYTHEVILLE

No. MC 89913 (Sub No. 6)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-WALNUT RIDGE

No. MC 89913 (Sub No. 10)
FRISCO TRANSPORTATION COMPANY EXTENSION—
BLYTHEVILLE-LAKE CITY

No. MC F 578
FRISCO TRANSPORTATION COMPANY PURCHASE—
JOSEPH D. COOPER

No. MC-F 618
FRISCO TRANSPORTATION COMPANY PURCHASE—
JOHN HAMM

No. MC F 619
FRISCO TRANSPORTATION COMPANY PURCHASE—
J. A. ROSE

No. MC F 678
FRISCO TRANSPORTATION COMPANY PURCHASE—
JOSEPH W. PARKER

No. MC F 679
FRISCO TRANSPORTATION COMPANY PURCHASE—
LOUIS TOLSON

Upon consideration of the records in the above-entitled proceedings, and of petition of Frisco Transportation Company, dated March 29, 1945, for hearing; and good cause appearing therefor:

It is ordered, That said proceedings be, and they are hereby reopened for further hearing at a time and place to be hereafter fixed.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL.)

[fol. 235] ORDER

INTERSTATE COMMERCE COMMISSION

No. MC 89913 Sub 1
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

No. MC 89913 Sub 2
FRISCO TRANSPORTATION COMPANY EXTENSION—
HUGO TO PARIS

No. MC 89913 Sub 3
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-CARTHAGE

No. MC 89913 Sub 5
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-BLYTHEVILLE

No. MC 89913 Sub 6
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-WALNUT RIDGE

No. MC 89913 Sub 10
FRISCO TRANSPORTATION COMPANY EXTENSION—
BLYTHEVILLE-LAKE CITY

No. MC-F-578
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH D. COOPER

No. MC-F-618
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOHN HAMM

No. MC-F-619
FRISCO TRANSPORTATION COMPANY—PURCHASE—
J. A. ROSE

No. MC-F-678
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH W. PARKER

No. MC-F-679
FRISCO TRANSPORTATION COMPANY—PURCHASE—
LOUIS TOLSON

PRESENT: William E. Lee, Commissioner, to whom the matters which are the subject of this order have been assigned for action thereon.

It appearing, That the above-entitled matter is one which the Commission is authorized by the Interstate Commerce Act, to refer to an examiner:

It is ordered, That the above-entitled matter be, and it is hereby, referred to Examiner W. T. Croft for further hearing on the 8th day of April, A. D., 1946, at 9:30 o'clock a.m. at the Hotel Pickwick, Kansas City, Missouri, and for recommendation of an appropriate order thereon accompanied by the reasons therefor, unless the parties to the proceeding agree to the omission of such recommended order;

It is further ordered, That applicant shall make available at the hearing a competent witness or witnesses for examination on all material and relevant facts recited in the application;

It is further ordered, That in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted;

It is further ordered, That notice of this proceeding be duly given;

[fol. 236] *And it is further ordered,* That any party desiring to be notified of any change in the time or place of the said hearing (at his own expense if telegraphic notice becomes necessary) shall inform the Interstate Commerce Commission, Washington, D. C., to that effect by notice which must reach the Commission within ten days from the date of service hereof and that the date of mailing of this order shall be considered as the time when the order is served.

Dated at Washington, D. C., this 8th day of March, A. D., 1946.

By the Commission, Commissioner Lee.

W. P. Bartel,
Secretary.

(Seal.)

[fol. 237] STENOGRAPHERS' MINUTES

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-89913, Sub-No. 1, and Related Subs No. MC-F-578 et al.

In the Matter of

FRISCO TRANSPORTATION COMPANY.

At Kansas City, Mo.,
Date April 8, 1946.

[fol. 238] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-89913, Sub-No. 1.

FRISCO TRANSPORTATION CO. EXTENSION—
JOPLIN-MIAMI.

Docket No. MC-89913, Sub-No. 2.

FRISCO TRANSPORTATION CO. EXTENSION—
HUGO TO PARIS.

Docket No. MC-89913, Sub-No. 3.

FRISCO TRANSPORTATION CO. EXTENSION—
JOPLIN-CARTHAGE.

Docket No. MC-89913, Sub-No. 5.

FRISCO TRANSPORTATION CO. EXTENSION—
MEMPHIS-BLYTHVILLE.

Docket No. MC-89913, Sub-No. 6.

FRISCO TRANSPORTATION CO. EXTENSION—
MEMPHIS-WALNUT RIDGE.

Docket No. MC-89913, Sub-No. 10.

FRISCO TRANSPORTATION CO. EXTENSION—
BLYTHEVILLE-LAKE CITY.

Docket No. MC-F-578.

FRISCO TRANSPORTATION CO.—PURCHASE—
JOSEPH D. COOPER.

Docket No. MC-F-618.

FRISCO TRANSPORTATION CO.—PURCHASE—
JOHN HAMM.

[fol. 239] Docket No. MC-F-619.

FRISCO TRANSPORTATION CO.—PURCHASE—
J. A. ROSE.

Docket No. MC-F-678.

FRISCO TRANSPORTATION CO.—PURCHASE—
JOSEPH W. PARKER.

Docket No. MC-F-679.

FRISCO TRANSPORTATION CO.—PURCHASE—
LOUIS TOLSON.

Room 202, Hotel Pickwick,
Kansas City, Mo.
Monday, April 8, 1946.

Met pursuant to notice, at 9:30 a.m.

BEFORE:

W. T. Croft, Examiner.

APPEARANCES:

A. J. Baumann and E. J. Damon, Attorneys, Frisco Transportation Co., Frisco Building, 906 Olive Street, St. Louis 1, Mo., appearing for Frisco Transportation Co., applicant.

W. M. Dyer, Manager, Traffic and Transportation Department, The Wichita Chamber of Commerce, 1019 Beacon Building, Wichita, Kans., appearing for The Wichita Chamber of Commerce, intervener.

Lee Reeder, Attorney at Law, 1806 Federal Reserve Bank Building, Kansas City 6, Mo., appearing for Campbell [fol. 240] Sixty-Six Express, Inc., and Arkansas Motor Freight Lines, Inc., interveners.

Wentworth E. Griffin, Attorney at Law, 1806 Federal Reserve Bank Building, Kansas City 6, Mo., appearing for Campbell Sixty-Six Express, Inc., and Arkansas Motor Freight Lines, Inc., interveners.

B. W. La Tourette, Attorney at Law, 314 North Broadway, St. Louis 1, Mo., appearing for Viking Freight Company et al., interveners.

Samuel Earnshaw, Care American Trucking Associations, Inc., 1424 Sixteenth Street, N.W., Washington 6, D. C., appearing for American Trucking Associations, Inc., intervener.

[fol. 241] PROCEEDINGS OF APRIL 8, 1946

Exam. Croft: Let's come to order, please, gentlemen. The Interstate Commerce Commission has set for further hearing at this time and place docket No. MC-89913, Sub-No. 1; also the same number, Subs 2, 3, 5, 6, and 10, and related finance cases except F-1037 which is the finance proceeding out of which the Sub 10 rights grew. That finance proceeding has not been reopened.

In entering your appearances please state your street and city address for the record and indicate whether or not you have been admitted to practice before the Commission.

Who appears for the applicant?

Mr. Baumann: E. J. Damon and A. J. Baumann, 906 Olive Street, St. Louis, Mo., both attorneys and licensed practitioners, appearing on behalf of Frisco Transportation Company.

Mr. Damon: We are in doubt as to what our position is in this particular case, whether it is applicant or defendant. We don't know just which.

Exam. Croft: Well, let's adhere to the term "applicant" —at least following the usual form—and we will see what develops.

Any other appearances?

Mr. Dyer: W. M. Dyer, 1019 Beacon Building, Wichita, Kans. I am a registered practitioner. I am appearing here in support of applicant in behalf of the Wichita Chamber [fol. 242] of Commerce, Wichita, Kans.

Exam. Croft: Any others?

Mr. Reeder: Lee Reeder, 1806 Federal Reserve Bank Building, Kansas City, Mo. I am an attorney at law, and I am admitted to practice before the Interstate Commerce Commission. I am appearing here in behalf of Campbell "Sixty-Six" Express, Inc., and Arkansas Motor Freight Lines, Inc.

Appearing with me is my associate, Wentworth E. Griffin, who is an attorney at law and whose application for admittance to practice is pending before the Interstate Commerce Commission. I ask the Examiner for leave for him to participate in this case.

Exam. Croft: He may under the circumstances.

Mr. La Tourette: B. W. La Tourette, 314 North Broadway, St. Louis, Mo., appearing for Viking Freight Company and other carriers whose names are shown on my appearance blank. I am an attorney at law and registered to practice before the Interstate Commerce Commission.

Mr. Earnshaw: Samuel Earnshaw, 1424 Sixteenth Street, N. W., Washington, D. C. I am admitted to practice and am appearing on behalf of the American Trucking Associations, Inc.

Exam. Croft: Any others?

If not, you may proceed, Mr. Baumann.

Opening Statement by Mr. Baumann

Mr. Baumann: Mr. Examiner, these instant proceedings [fol. 243] were started by an order issued by this Commission on January 4, 1945, in which they were reopened for alleged reconsideration upon good cause appearing therefor.

Following that a proposed report was rendered by Examiner David Waters, to which Frisco Transportation Com-

pany took exceptions. Replies to such exceptions were filed by Campbell "Sixty-Six" Express, Inc., and Arkansas Motor Freight Lines, Inc., and the Regular Common Carrier Conference of the American Trucking Associations.

The basis of the proposed report was apparently that of a decision in a case entitled "Campbell 'Sixty-Six' Express v. Frisco Transportation Company and others," at that time pending for consideration before the full Commission. Now, since that time the full Commission has rendered a decision somewhat contrary to the opinion of division V. Frisco Transportation Company is doubt and is not aware of what disposition of record has been made of the proposed report by David Waters.

Exam. Croft: It's not unusual, of course, for the Commission to reopen a case after a proposed report ordinarily on petition for rehearing. In this case they saw fit to do it on their own motion, and I think the proposed or recommended report of Examiner Waters should be completely disregarded. It has no further effect and has been superseded by the order reopening.

Mr. Baumann: May I ask, then, what is the status of the [fol. 244] exceptions filed by Frisco Transportation Company? Do they follow the same course?

Exam. Croft: I should say that they do. They are of no further effect in this proceeding, the report to which they relate having been in effect wiped out.

Mr. Baumann: Then there was an order issued on May 28, 1945, which says, "Upon consideration of the records in the above-entitled proceedings and of petition of Frisco Transportation Company dated March 29, 1945, for hearing,—the proceedings are reopened for further hearing." What happens to that order?

Exam. Croft: May 28, 1945?

Mr. Baumann: Yes.

Exam. Croft: That is the order under which this hearing is being held, is it not?

Mr. Baumann: Now, then, I would call your attention to the fact that no request for any type of a hearing was made in our exceptions to David Waters' proposed report; and for that reason, if the exceptions follow the proposed report, there does not exist actually a request for a hearing by

Frisco Transportation Company, and that is our stand at this time.

Exam. Croft: Well, I don't understand that last statement. Do you mean that you are objecting to the hearing at this time?

Mr. Baumann: I am inquiring first. There was no formal request made by Frisco Transportation Company for a hear-
[fol. 245] ing in these proceedings except insofar as is contained in the exception to David Waters' report, and that request read, "Realizing that matters of fact not in the present record were presented in the brief, the Frisco Transportation Company requests a hearing." In other words, it would be entirely to substantiate our exceptions.

Exam. Croft: Well, in my statement that the exceptions to the report and the report itself are of no further effect, of course, I had in mind exceptions based upon the merits. Insofar as those exceptions did request a further hearing, which has been granted, they certainly are in the record yet for that purpose. On the other hand, I should say that this order was entered not only in response to that request but, to some extent, upon the Commission's own motion; "upon consideration of the record," as the order recites.

Mr. Baumann: All right.

Now, Frisco Transportation Company objects to the institution of these proceedings on any ground and for any reason whatsoever for the reason that the Commission is without power to reopen a certificate in the manner here sought to be reopened.

We further object to any further hearing in this matter for the reason that all persons and parties who were interested in the original proceedings had full opportunity to be heard at the time and place of the hearings on all
[fol. 246] matters pertaining to the transactions; that following such hearings proposed reports by examiners and orders of the Commission were issued; that since the date of the issuance of those reports and orders no party has ever appeared of record seeking a reopening of these proceedings for any cause whatsoever, and there is absolutely no justification for a reopening of these proceedings.

We further object to the reopening of these proceedings because, after full proceedings in accordance with the laws

governing and the rules of this Commission, the Commission undertook to, and did, issue to Transportation Company appropriate certificates setting forth specifically the operations which Transportation Company was authorized to conduct.

No objections were raised at any time by anyone to the issuance of these certificates, and, once having issued such certificates, the Commission is now without power to change, amend, or modify such certificates through the manner and means here sought to be invoked.

We further object to the reopening of these proceedings on the grounds that there was no inadvertence in the issuance of these certificates, and, consequently, any attempt to destroy or amend or revoke the same constitutes a deprivation of our rights, in violation of statutory and legal grounds.

We further state that, relying on the issuance of these certificates, which are now some 6 to 8 years old—the pro-
[fol. 247] ceedings have been closed that long—that this Transportation Company has invested substantial sums of money in equipment, buildings, and appurtenances, and if we are now required in any wise to change our method of operation and these certificates are amended and revoked, it will constitute a deprivation of valuable rights without due process of law and without any authority in law whatever.

We further call your attention to the fact, in this connection, that the rights which were acquired by Transportation Company through the basic finance proceedings were "grandfather" rights of its vendors and that, therefore, this Commission is further without power to alter, abridge, or change such rights, even though subsequently acquired by Transportation Company. In most of the instances the "grandfather" certificate had not been issued to the vendor but was merely issuable and Transportation Company was substituted in lieu of the vendor.

We specifically object to the opening of Sub-No. 10 because there is an alleged reservation of power that exists in the certificate. We object to it because it is contrary to law and exceeds any statutory power given this Commission under the applicable law.

That's the end of our objections.

Exam. Croft: Your objections will be noted. I assume that the thing to do is either to tentatively deny them now [fol. 248] or merely reserve the ruling. You may consider it in either light. I think we should go ahead with the hearing at this time, possibly reserving the ruling until all parties have had an opportunity to brief the questions.

Mr. Baumann: Mr. Examiner, then, as another matter of procedure, if you please, we wish to move that these proceedings be discontinued forthwith on the ground that they were unlawfully begun, without authority of statute; further for the reason that full hearings were held under section 213, part II, of the Interstate Commerce Act to determine whether the transactions there proposed should be approved by this Commission; that this Commission subsequently did approve those transactions and thereafter, through its own act, assigned docket No. MC-89913 and subnumbers, and then issued certificates to Transportation Company covering routes and service to be performed without any objections from anyone, and that this Commission is, therefore, without authority to set aside, revoke, or amend those certificates in these proceedings.

Furthermore, there was full opportunity at all prior hearings given to all parties then interested to be heard, and in nearly every instance parties did appear, as the records in these various proceedings will show.

Furthermore, no inadvertence appears of record in the issuance of these certificates, and certainly no one here is alleging that there was fraud or anything like that in the [fol. 249] issuance or the obtaining of these certificates.

This Transportation Company's operations under these various certificates have been under investigation by this Commission in the Campbell "Sixty-Six" case, and this Commission found that the operations conducted by Transportation Company at the present time are in consonance with those certificates.

Now, in connection with—

Mr. Earnshaw: Well, now, Mr. Examiner, would it not be in order to suggest that argument be reserved for a later time?

Mr. Baumann: It is merely a part of my motion, sir. They are very brief, and it is a part of the motion.

Exam. Croft: You may go ahead.

Mr. Baumann: We are not stating any conclusions or argument.

We further move the discontinuance on the ground that a change, revocation, or amendment of these certificates would result in the taking of property without due process of law in that the Transportation Company has made extended investments in its operating property and has an extended personnel.

In connection with this motion and before your ruling, we would like to present some testimony dealing with the two matters.

Exam. Croft: What is the nature of this testimony?

Mr. Baumann: One witness will testify that there was no inadvertence and will bring, in effect, the record up to [fol. 250] date from the date of the issuance of the report and order of the Commission. We have compiled all the attendant matters and correspondence respecting the adoption of tariffs and issuance of certificates. While we know some of those are matters directly of record, we thought it would be welcome and informatory if they were all presented here at one time.

The other witness will present you a comparative balance sheet over the years, certain statistical data as to employees, and the amount of equipment we have, and things of that sort.

Exam. Croft: The procedure is a little bit irregular, but it seems to be justified in this case. You may call him.

Mr. La Tourette: I wonder, Mr. Examiner, if you wish any observations from any of the parties with respect to certain matters that have been suggested by counsel?

Exam. Croft: My thought, Mr. La Tourette, is that we should permit the applicant to put in such proof as he wants to to substantiate his statements in support of his motion and his objection.

Mr. La Tourette: Very well.

Exam. Croft: And that thereafter the ruling on both should be withheld until the parties have had an opportunity to brief it. And it seems to me that on brief is the

proper time to make your comments, unless you have something that should, in your opinion, be said here.

Mr. La Tourette: Well, the matter that I was going to dis- [fol. 251] cuss related to the statement made by counsel that parties appeared in these various proceedings. Of course, there were a number of us who were representing carriers whose operations did not appear to be involved in these particular cases, but when considered together with other operations then conducted by the carrier or subsequently acquired through similar proceedings the whole picture developed. And I did not want the Commission to understand that certain carriers now in these proceedings have been derelict in their duties.

Exam. Croft: I think your position is clear and you will be in position to argue it as much as you like in your brief.

Mr. Damon: Mr. Examiner, I would like to inquire about the interventions that were permitted by the Commission which were long prior to the issuance of the proposed report, some of them; in other words, after the proposed report and prior to the filing of our exceptions. What position are they in?

Exam. Croft: I think the time of the intervention would make no difference, Mr. Damon. They are now parties to the proceeding. The mere fact that you intervened before or after the reopening of the proceeding or for reconsideration, if your intervention was allowed you would be a party. Now, they may say they have no interest or they may confirm their suspected interest.

Mr. Damon: And I might inquire: We have received, outside of your statement there, no official notice from the [fol. 252] Commission that the order of January 4, 1945, has been canceled.

Exam. Croft: Well, that follows. I don't know that I said that, but I would assume that it follows, as a matter of course, that an order reentering a case for a further hearing supersedes any order opening it for reconsideration. It is apparent that in the course of reconsideration they decided that a further hearing was necessary and that the possibility of reconsidering it on the record as already made wasn't practical or adequate. In other words, the further hearing implies also further consideration after that, and to

that extent it supersedes the prior order which did not contemplate any further hearing.

Mr. Damon: You understood our position that our request for a hearing was included in our exceptions?

Exam. Croft: Yes, I understood that.

Mr. Damon: And not a request for a rehearing or a reopening.

Exam. Croft: I understand that.

Mr. Damon: All right.

Mr. Baumann: May we have a little time out to number some exhibits?

Exam. Croft: Yes.

(Discussion off the record.)

Exam. Croft: Off the record the applicant has presented and we have numbered a series of exhibits, 1-A to 7-A. The [fol. 253] map now being circulated will be No. 8-A for identification.

(The documents referred to were marked as "Applicant's exhibits Nos. 1-A thru 8-A, Witness Essex," for identification.)

Exam. Croft: In that connection, too, Mr. Reporter, I think you should number the pages of this transcript beginning with 1-A, 2-A, etc., rather than taking the next succeeding page number in any of the consolidated dockets or starting again with page 1.

Mr. Baumann: I will call Mr. Essex.

JOHN S. ESSEX, was sworn and testified as follows:

Direct examination.

By Mr. Baumann:

Q. Please state your name.
A. John S. Essex.
Q. And your occupation and address?
A. Chief accountant for Frisco Transportation Company.

Q. Where?

A. Springfield, Mo.

Q. In your capacity as chief accountant of the Frisco Transportation Company do you have charge of the books of accounts and statistical matters of the Frisco Transportation Company?

A. Yes, sir; they are prepared under my supervision.

Q. Have you previously testified before this Commission and before the State Commissions in connection with matters pertaining to the Frisco Transportation Company?

[fol. 254] A. Yes, sir.

Q. Have you also previously testified before State Commissions on behalf of motor carriers in this area generally with respect to rate increases sought by them?

A. Yes, sir.

Q. Mr. Essex, you have before you exhibit No. 1-A, consisting of 6 sheets. Will you proceed to take that exhibit and explain briefly what it contains?

A. Sheet No. 1 of exhibit No. 1-A shows the comparative general balance sheet of the Frisco Transportation Company at December 31 for the years 1938 to 1945, inclusive.

Q. Is this a consolidation of the balance sheet as of the end of each year?

A. Yes, sir.

Q. Showing the actual figures?

A. Yes, sir.

Q. Now, the second sheet is the commitments for purchase options pending. Will you state how that ties into the comparative general balance sheet?

A. The second sheet includes information that constitutes balance sheet footnotes, showing contingent liabilities in connection with purchase options pending as of the dates indicated on the sheet.

Q. So that as of December 31, 1939, your balance sheet showed you had purchase commitments of $78,100?

[fol. 255] A. The footnote to the balance sheet shows that; yes, sir.

Q. This is, in effect, a footnote to the balance sheet?

A. Yes, sir.

Q. Now will you proceed to sheet three?

A. Sheet 3 shows tangible property as of December 31 for the years 1938 to 1945, inclusive, broken down as to revenue equipment, subdivided between freight and passenger, and further broken down as to service cars and equipment, shop and garage equipment, furniture and office equipment, and miscellaneous equipment, showing in each case a related depreciation set-up in reserve accounts.

Q. Now, the basis of these figures is what? What is the source of these figures?

A. These figures were taken from the general books of the Frisco Transportation Company, and the amounts before the deduction of depreciation represent actual costs.

Q. Will you proceed to the next page and explain it, briefly?

A. Sheets Nos. 4 and 5 of exhibit 1-A show the cost of intangible property, sheet No. 4 being that shown for organization, franchises, and permits, and sheet No. 5 showing other intangible property. Sheet No. 6 is a continuation of sheet No. 5, showing other intangible property.

Q. Is that a break-down of an account on the general balance sheet?

A. Yes, sir.

[fol. 256] Q. Will you designate what account that is?

A. The account on the general balance sheet is designated as "Intangible Property," showing at December 31, 1945, a net amount of $49,794.06, which is the total of sheets 4 and 6, including both intangible and tangible property.

Q. Have you anything else you desire to add respecting that exhibit?

A. I want to correct myself on the last statement. It does not include the tangible property. It is the intangible property only.

Mr. La Tourette: Mr. Baumann, may I ask a question?

Mr. Baumann: Surely.

Mr. La Tourette: How many sheets are there attached to exhibit 1-A? I was just wondering if I was short.

Mr. Baumann: There are six sheets altogether; a big one and five small ones.

By Mr. Baumann:

Q. Will you take up exhibit 2-A and explain what that exhibit is?

A. Exhibit 2-A is a statement showing the details of the purchase of common-carrier rights from John Hamm, J. A. Rose, Joe Cooper, J. W. Parker, Louis Tolson, and T. N. Bennett, showing the dates each purchase was made, the name of the vendor, the I. C. C. docket number, the cost of the rights, the cost of the tangible property, the amount paid to the seller, the expenses in connection with obtaining the rights, and the total cost to the Frisco Trans-
[fol. 257] portation Company.

Q. And these were taken from the books of account under your jurisdiction?

A. Yes, sir.

Q. You note the item "Tangible Property." What did that generally include?

A. "Tangible Property" generally includes trucks, tractors or trailers, or shop equipment.

Q. Do you understand these to be the underlying purchases involved in these reopened proceedings?

A. Yes, sir.

Q. Will you take up your exhibit 3-A and state generally what it is and the source of the information?

A. Exhibit No. 3-A is a statement showing the classification and number of truck employees of the Frisco Transportation Company as of various dates indicated, and the information was taken from our pay-roll records.

Q. All right. Will you take exhibit No. 4-A and state generally what it contains and the source of the information?

A. Exhibit No. 4-A is a statement showing the investment account, net book cost after deducting depreciation and amortization, as of December 31 for the years 1938 to 1945, inclusive, showing the net book cost of tangible property and intangible property and the total of the two.

Q. And what is the source of that information?

[fol. 258] A. The source of that information is the books and records of the Frisco Transportation Company.

Q. Take your exhibit No. 5-A.

A. Exhibit No. 5-A is a statement of the tons of revenue freight handled by the Frisco Transportation Company for the years 1938 to 1945, inclusive, separated between exclusive truck and joint rail-truck.

Q. What do you mean by "exclusive truck"?

A. "Exclusive truck" is tonnage handled by motor carrier on motor-carrier waybills, on which motor-carrier rates have been assessed.

Q. And "joint rail-truck:" What do you mean by that?

A. "Joint rail-truck" is tonnage handled in substituted service for the Frisco Railway.

Q. That's the parent company?

A. Yes, sir.

Q. Will you take exhibit 6-A and state what it is and what it shows?

A. Exhibit 6-A is an income account in condensed form of the Frisco Transportation Company for the years 1938 to 1945, inclusive, showing revenues, expenses, net operating revenues, and net income. The asterisk indicates "red" or a deficit.

Q. And the source of that—

A. The source of this information is the books and records of the Frisco Transportation Company.

[fol. 259] Q. Take your exhibit No. 7-A and state what it contains and the source of the information.

A. Exhibit No. 7-A is a statement showing the number of owned and leased trucks, tractors, and trailers as of December 31 for the years 1938 to 1945, inclusive.

Q. Are those all end-of-the-year totals?

A. Those are end-of-the-year totals; yes, sir; as of December 31.

By Exam. Croft:

Q. When you talk of "leased trucks" you mean long-term leases?

A. Yes, sir.

Q. Because you do not engage in the use of owner-operators or trip leases?

A. No. This includes our regular, yearly leased equipment.

Mr. Baumann: There may be times when we have owner-operator leases.

Exam. Croft: But they are not included in this list?

Mr. Baumann: But they are not included in this list.

Exam. Croft: Very well.

Mr. Baumann: You were speaking of the trip-lease type, and there are, of course, times when that does exist.

Exam. Croft: Well, I just wanted to be sure that they are not included in this or find out whether they were.

By Mr. Baumann:

Q. Mr. Essex, you have before you a map previously marked "Exhibit No. 8-A." Have you examined that map [fol. 260] and are you prepared to state that it reflects the operations of the Frisco Transportation Company and that the legend contained thereon is true and correct?

A. Yes, sir.

Mr. Baumann: Do you want any more explanation about the legend?

Exam. Croft: It appears to be self-explanatory. I don't think it will need anything more. The black lines are motor routes of the Frisco?

Mr. Baumann: That is true.

By Mr. Baumann:

Q. The black lines are motor routes of the Frisco, Mr. Essex?

A. The black lines are motor routes of the Frisco Transportation Company, interstate authority, in addition to some of those indicated in colors.

Exam. Croft: Well, my only—

The Witness: However, the black line continues along with the colors. The black lines indicate the interstate motor-carrier routes.

Exam. Croft: May I ask, Why did you color some of the routes not involved in this proceeding and not others? I don't know that it's significant, but it might be helpful to get your thought.

Mr. Baumann: The purpose of the map was to show the entire operations. Where the solid black line appears,

[fol. 261] it shows Frisco Transportation Company certificated operations. The hatched line is the parent railway, the little hatched lines.

Now, according to the legend, we have taken and designated in separate colors the operations under each one of the subnumbers. And we have also shown the operations under lease in yellow over here in the western part of Missouri. And over in the eastern part of Missouri you will notice an operation is being conducted under temporary authority, Sub-No. 38-W. Now, the other lines, the first six on the legend, show the ones that are involved in this proceeding.

Exam. Croft: I think it is clear, then. Thank you.

Mr. Baumann: Our purpose was to set out what was involved in these proceedings as distinguished from our entire operation.

Exam. Croft: Thank you.

Mr. Baumann: The reason I say that is that we all got together and tried to make a clear map for you.

By Mr. Baumann:

Q. Now, Mr. Essex, approximately how many miles does Frisco Transportation Company operate?

A. During the year 1945 Frisco Transportation Company operated 6,340,000—

Q. No, I am talking about road-miles as distinguished from truck-miles. I meant the mileage of operation.

A. The highway mileage operated by the Frisco Transportation Company in truck operations is 4,800.

[fol. 262] Q. Now, how many miles of that operation are covered by Subs 1, 2, 3, 5, 6, and 10?

A. 284 miles.

Q. Mr. Essex, you have doubtless made a study as to the effect of a change in these certificates issued under these subnumbers, particularly with respect to David Waters' report, and probably also with respect to limiting the operations of the Frisco Transportation Company over these small segments to the handling purely of freight in substituted service for Frisco Railway. Based on your familiarity with the operations and the books of accounts and statistics of Frisco Transportation Company, how

much of a loss would be involved to Frisco Transportation Company?

Mr. Reeder: Pardon me just a minute. I wonder if it wouldn't be proper to object to that question at this time for the reason that all of the foundation for the answer has been laid in the question. There has been no foundation laid by the witness as to any study he has made.

Mr. Baumann: I call your attention to this fact: That Mr. Essex has been qualified as an expert, and in putting a hypothetical question to an expert you are presumed to put in all the basic facts.

Mr. Reeder: I didn't understand it was a hypothetical question. I thought that he was taking the position that a study had been made and that he had reached a conclu- [fol. 263] sion based upon that study.

Mr. Baumann: O. K.

By Mr. Baumann:

Q. Mr. Essex, are you well acquainted with the operation of the Frisco Transportation Company?

A. Yes.

Q. How long have you been working for them?

A. I have been working for the Frisco Transporation Company 6½ years.

Q. You have grown up with the company, in effect, haven't you?

A. Yes, sir.

Q. You have kept the books and statistics during that entire time?

A. Yes, sir.

Q. Have you considered or made a study of the effect on the carrier's revenue if the present certificates are revoked or amended or if as to these small segments the Transportation Company was restricted to the handling solely of freight in substituted service for Frisco Railway? Have you made such a study?

A. Yes, sir. I have made a study for the period February 3 to February 9, 1946, inclusive, of all way bills of the Frisco Transportation Company, which shows a total of 170,540 pounds of freight, revenue $1,406.13. On that basis for the one week, the amount for a year would be 8,868,080 pounds with a revenue loss of $73,118.76.

[fol. 264] Q. When you speak of a "revenue loss," what loss of freight is contemplated by those figures?

A. These figures include only the motor-carrier revenue on freight handled on motor-carrier rates.

Mr. La Tourette: Mr. Baumann, do they include figures only as to shipments moving between points on the local segment?

Mr. Baumann: I will ask Mr. Essex to answer that.

By Mr. Baumann:

Q. Does it include merely shipments moving on the segments or other shipments?

A. No; it includes shipments moving into or through the segments involved in this proceeding.

Q. Is it proper to say, then, that your answer is based on the deprivation of the Frisco Transportation Company's right to haul or accept motor freight at motor rates and on motor billing?

A. Yes, sir.

Q. For these segments?

A. Yes, sir.

Mr. Baumann: You may cross examine.

Mr. Earnshaw: I think it would be helpful in planning our cross-examination of this witness if you would tell us the territory to be covered by the next witness so that we won't duplicate.

Mr. Baumann: The next witness will go to the question of inadvertence. We will attempt to show that there was [fol. 265] no inadvertence in the issuance of these certificates.

Mr. Earnshaw: You are not planning to put on a traffic witness at the present time, an operating witness?

Mr. Baumann: Insofar as our testimony in connection with the motion is concerned, we will have to defer that until later.

Cross-examination.

Mr. La Tourette: I just have a question of the witness, for clarification primarily.

By Mr. La Tourette:

Q. In arriving at the $73,000 revenue loss, Mr. Essex, as I understand it, then, you have taken into consideration shipments which might originate at Memphis, Tenn., and be destined to a point between Joplin and Miami, Okla., for example?

Exam. Croft: Is that correct?

A. Yes, that would be correct, except that it wouldn't necessarily obtain to the Joplin and Miami area.

By Mr. La Tourette:

Q. I understand. But that was one of the particular types of operation you took into consideration?

A. Yes, sir.

Q. In other words, you have viewed the revenue loss from the standpoint of operations to or from any of the segment operations when the shipment originates at any other point on the Frisco Transportation Company system?

A. Yes, sir; that's right.

[fol. 266] Mr. La Tourette: That's all.

Exam. Croft: Any further questions? Mr. Reeder?

Mr. Reeder: Yes.

By Mr. Reeder:

Q. Mr. Essex, referring to exhibit No. 6-A, which shows revenues, expenses, net operating revenues, and net income, is the net income before or after income taxes?

A. The net income is after income taxes.

Q. Referring to exhibit 7-A, which has to do with trucks and tractors operated, are the total figures shown in the fourth column the number of vehicles being used on the 31st day of December each year or is that the aggregate of the vehicles used during the year?

A. That is the number of vehicles being used as of the last day of each year as indicated.

Q. In making your traffic study did you include freight moving in intrastate commerce as well as interstate commerce?

A. Interstate only.

Q. Did you include in that study traffic which was being transported by the railroad?

A. No, sir.

Q. Either in substituted service or railroad traffic that was on your trucks for any reason or in any manner?

A. No, sir; none of that is included.

Q. That's all motor freight?

A. All motor freight.

[fol. 267] Mr. Reeder: That's all.

By Mr. Baumann:

Q. Mr. Essex, respecting the last question, the traffic that Transportation Company handles for St. Louis-San Francisco Railway: Is that entirely under a substituted service? A. Yes, sir.

By Exam. Croft:

Q. In connection with this anticipated loss, Mr. Essex, did you make any allowance for the possibility that the traffic which has heretofore moved all motor might, instead of moving all motor, be handled for the railroad on rail rates and rail billings?

A. I gave that no consideration.

Q. In other words, you assumed a complete loss of traffic instead of a transfer from the motor to the rail billing?

A. Yes, sir.

Q. Don't you think that there is a strong probability that the traffic would nevertheless remain with the railroad directly rather than to go to some other carrier?

A. It is possible.

Q. And to the extent that it did, your $73,000 loss would be cut down?

A. The $73,000 represents only the motor-carrier revenue.

Q. I appreciate that.

A. Now, if you take into consideration the loss of revenue on substituted-service freight—

[fol. 268] Q. There would be no loss on that, would there?

Substituted-service freight? There is no proposal of any kind that I know of to close the door to that.

A. It is possible under those circumstances that the $73,000—

Q. Well, my thought is that, Assuming that restrictions should be imposed that required you to operate only in substituted service, you wouldn't necessarily lose the traffic. The railroad wouldn't necessarily lose the traffic represented by this $73,000.

Mr. Baumann: Mr. Examiner, may I state this: Our two companies are entirely separate as to accounts and traffic.

Exam. Croft: But they are identified in the public mind and the shipper's mind.

Mr. Baumann: We realize that; but, as to this witness, he works and his office is in Springfield, and the general accounts of the Railway Company are in St. Louis. And likewise your traffic departments are entirely separate or divorced.

Exam. Croft: I am not being critical. I merely asked him, Did he make any allowance for the possibility of this traffic moving to the railroad instead of to some other independent carrier?

Mr. Reeder: This line of cross-examination— Had you finished, Mr. Examiner?

Exam. Croft: Yes, for the moment.

Mr. Reeder: —has brought to my mind a subject about [fol. 269] which I should like to inquire.

By Mr. Reeder:

Q. Mr. Essex, isn't it a fact that the Frisco Transportation Company transports shipments moving, for illustration, between St. Louis, Mo., and Fort Smith, Ark., for the railroad and in the same truck shipments which are moving directly for the public moving between the same points?

A. As to specific points I am unable to give you the information. But both types of freight could be, and possibly are, moved in the same truck.

Q. Well, as a matter of fact, they are handled in the same truck, aren't they?

A. I would say they were if both types of freight were available for transportation at the same time.

Q. And, of course, the rail freight is moving on rail rates and on rail billing, isn't it?

A. Yes, sir.

Q. And the truck freight is moving on truck rates and on truck billing, isn't it?

A. Yes, sir.

Q. Now, isn't it a fact that there is in most instances a difference between the truck rates and the rail rates on similar commodities between the same points?

Mr. Baumann: Mr. Examiner, this witness is not qualified. We will admit that there is. That's the basis of a lot of this argument today; that there is a difference in [fol. 270] the rail rates and motor rates. That's a matter of law. This man doesn't know; he is not a rate man.

Exam. Croft: I think Mr. Reeder's thought is apparent: that if this traffic is lost to you that it might move to the railroad at higher rates. You might have something to compensate for this $73,000 loss.

Is there a question pending?

Any further cross-examination of this witness?

By Mr. Earnshaw:

Q. Mr. Essex, you are an employee of the accounting department?

A. Yes, sir.

Q. Who in your company has occasion to make traffic forecasts?

A. I don't know.

Q. Is that in the province of the traffic department?

A. That's right; yes, sir.

Q. And when you come to making estimates of what conditions will be in the future under a different set of operations, wouldn't that be a joint problem for the traffic and the operating departments?

A. I think it would.

Q. So what you have given us is the actual figures of

the amount of what you call "exclusive truck traffic" over the lines involved during the period of your testimony?

A. Yes, sir.

Q. You have given us what actually happened rather [fol. 271] than any opinion as to what would happen in the future under different conditions?

A. That's right.

Q. Yes. Now I have a few more questions on the exhibits.

Exhibit No. 3-A, classification and number of truck employees: Does that include any joint employees with the railroad?

A. No, sir.

Q. Does your company have joint employees with the railroad?

A. The company has some joint agents with the railroad at some of the smaller points.

Q. So those would be added in another column to make this picture complete?

A. If you wanted to add those. These are the employees who appear on Frisco Transportation Company pay rolls.

Q. These are full-time employees?

A. Yes, sir.

Q. How about solicitors? Are there any solicitors included in this?

A. There are solicitors included.

Q. And are there other solicitors who would come under that category of joint employees?

A. No, sir; not to my knowledge. We have no joint solicitors.

Q. Except the joint agents. The joint agents you referred to might have solicitation functions?

[fol. 272] A. It is possible.

Q. Now, on your tons of revenue freight handled: Are those system totals? That's exhibit 5-A.

A. 5-A: Those are system totals; yes, sir.

Q. Did you make any attempt to break those down as to routes?

A. No, sir.

Q. For any year or any tax period.

A. No, sir.

Q. Do you have the break-down on your February 3 tax period by routes?

A. February 3 to February 9, 1946?

Q. Yes.

A. That includes the total, for the entire area.

Q. Yes. Do you have the break-downs for each one of the routes here involved as to tons and revenue?

A. Yes, I have that break-down.

Q. Do you have the vehicle-miles over those routes for the same period?

A. No, sir; no record of any vehicle-miles.

Q. You don't have the corresponding vehicle-miles for those routes?

A. No, sir.

Q. So that there would be no way of ascertaining the load factor on the particular routes involved?

A. No, sir.

[fol. 273] Q. On exhibit 5-A, when it says "Joint Rail-Truck," it doesn't necessarily mean that there was a rail movement in each case, does it? Doesn't that refer to the billing used for the particular shipment?

A. That refers to the rail freight moving in substituted service by truck.

Q. It might very well be 100 percent truck movement although on rail billing, is that correct?

A. I suppose it is possible.

Q. Now, in your expenses on exhibit 6-A, does this include both passenger and truck operations?

A. Yes, sir.

Q. Do you have the break-down for the truck alone with you?

A. Not for all years.

Yes, I do have it for all years from the year 1940 to 1945, inclusive.

Mr. Earnshaw: Would it be all right for me to look at that, Mr. Counsel?

Mr. Baumann: We have no objections.

Mr. Earnshaw: We might then decide what to do with it.

Mr. Baumann: Mr. Examiner, the Frisco Transportation Company will furnish a break-down between bus and

truck operations with respect to exhibit No. 6-A, beginning with the year 1940 and ending with the year 1945.

Mr. Earnshaw: Well, the bus isn't necessary. That [fol. 274] statement is just as to the truck. So if you confine it to that, it will be all right.

Mr. Baumann: Just the truck?

Mr. Earnshaw: Yes.

Mr. Baumann: Whichever you wish.

Exam. Croft: How much time will you require?

Mr. Baumann: Ten days from the close of the hearing.

Exam. Croft: All right. Suppose we just say that you will put in an amended exhibit—

Mr. Baumann: Well, it will be supplemental.

Exam. Croft: Very well.

(Discussion off the record.)

Mr. Baumann: Frisco Transportation Company is agreeable to furnishing a statement of revenues, expenses, operating revenues, net income, tonnage, vehicle mileage, and cost per mile for the years 1940 to and including 1945.

May we furnish that within 10 days after the close of the hearing?

Exam. Croft: You may.

Mr. Earnshaw: That is highly agreeable to us, Mr. Examiner.

Mr. Baumann: If you want to ask any questions on it, here is a copy of it.

(The document described to be furnished by applicant.)

Exam. Croft: Any further questions?

By Mr. Earnshaw:

Q. Is there a segregation in the accounts of Frisco [fol. 275] Transportation Company as between expenses entailed by handling so-called exclusive truck freight and so-called joint rail-truck freight?

A. No, sir.

Q. Has any attempt been made to set up a formula for the segregation of those expenses?

A. No, sir.

Q. Are you familiar with the arrangement whereby the railroad compensates the applicant for this so-called joint truck-rail service furnished?

A. Yes, sir.

Q. Is that an over-all arrangement covering the whole system or is that broken down by individual routes?

A. That's broken down to some extent.

Q. Will you explain your answer, please, to bring out just how it is broken down?

A. The rates are uniform with the exception of certain cotton movements.

Mr. Baumann: Could I ask him a question?

By Mr. Baumann:

Q. In the relation between the Transportation Company and its parent company, how are the revenues divided? Is it on a percent of a particular rate covering a particular shipment or is it an over-all percent of whatever basis you have?

That's what you want, isn't it?

[fol. 276] Mr. Earnshaw: Yes, sir.

A. It's on the over-all basis.

By Mr. Earnshaw:

Q. Percentage?

A. No.

Q. Cents per hundred pounds?

A. Cents per hundred pounds.

Q. Does that vary with the mileage?

A. No, sir.

Q. Do I understand correctly that there is a single uniform amount per hunderd pounds paid by the railroad to the Transportation Company for all freight handled over Transportation Company lines in substituted service?

A. No, sir.

Q. Except for the cotton?

A. Except for the cotton, that's true.

By Exam. Croft:

Q. Doesn't that amount vary with the type of freight involved?

A. No, sir.

By Mr. Baumann:

Q. Mr. Essex, just explain how that was set up over the years. Explain in your own words how you arrived at that.

Mr. Earnshaw: That was my next question.

A. The Transportation Company, at the time that it first started operations, or shortly thereafter at least, attempted to make a charge to the railroad on its local rates [fol. 277] for rail freight handled by truck in substituted service. It became so involved and burdensome it was decided that the rate would be based more on a uniform basis rather than an individual shipment basis, and for that reason for the past several years it has been on the so-many-cents-per-hundredweight basis.

By Mr. Earnshaw:

Q. Do you know approximately when that change was made?

A. I believe it was made in about the middle of 1940.

Q. And do you know—

A. I am not positive about that date.

Q. And do you know how the figure, uniform figure arrived at, was determined?

A. It was determined on the basis of costs of operation in connection with the average revenue per hundredweight for all business.

Q. Now, you have said both cost and revenue.

A. That's right.

Q. Could you explain that a little?

A. Now, for the first years after 1940, first 2 or 3 years, it was based on an average revenue. For example, if our average revenue including that, including the substituted-service freight, was under the amount charged to the railroad, it was determined that possibly the rate was too

low; and an agreement was made, after consideration, that possibly it should be either raised or lowered, as the case might be.

[fol. 278] Q. Does this figure vary from year to year?

A. Ordinarily not.

Q. You referred in the early years to an adjustment of this average up or down. What was the test of what the rail-substituted revenue should be?

A. I don't believe I understood your question.

Q. When you sought to arrive at a uniform figure, let us say in 1940, did you take the revenue for the year before and average it out?

A. I don't remember on what basis that was arrived at the time. It's been so long ago that I have forgotten it.

Q. Anyway, it was related to revenue?

A. Yes.

Q. Now, what consideration was given to costs at that time?

A. I don't recall the details of it at this late date.

Q. Now, what change, if any, has there been in the uniform figure used between that time and the present?

A. Well, I think there has been an increase of 5 cents per hundred pounds.

Q. Is that based on any particular consideration?

A. That's based on cost per ton.

Q. And was not necessarily related to average rate?

A. No.

Q. Average revenue?

A. No, sir.

[fol. 279] Q. Now, is there in existence a written agreement setting forth exactly what that figure for service covers?

A. It is a division basis.

Mr. Baumann: May I answer that, Counsel?

Mr. Earnshaw: Surely.

Mr. Baumann: There is a division sheet published that exists between the Frisco Transportation Company and the Frisco Railway; purely a division sheet, just as between any other carriers.

Mr. Earnshaw: Well, perhaps I may ask you this additional question, then: Is there any written understanding

between the two organizations as to exactly what is included in that figure by way of overhead and similar joint or constant costs?

Mr. Baumann: I will try to explain: The amount of the divisions is arrived at between the managements of the two concerns or the two outfits, and that is published in a division sheet which reflects the divisions. And it is based on cents per hundred pounds of every pound handled or every hundred pounds handled by the motor carrier for the railroad.

By Mr. Baumann:

Q. Is that right, Mr. Essex?

A. Yes, sir; that's right.

Mr. Earnshaw: Is that the only agreement between the railroad in writing?

Mr. Baumann: That's the only agreement as to divisions.

Mr. Earnshaw: Now, as to the question whether there [fol. 280] is any additional agreement: That's my question of the witness. I will now ask it of you, if I may.

Mr. Baumann: The only agreement in connection with substituted service is the division sheet.

Mr. Earnshaw: That's the point of my inquiry.

Mr. Reeder: You have another agreement, though, don't you, relating to other matters?

Mr. Baumann: Not specifically as to the handling of freight. There are contracts in existence between the Transportation Company and the railroad which cover the use of railroad property; as, for instance, a part of a station.

By Mr. Baumann:

Q. Isn't that right?

A. That's right; yes, sir.

Q. And what basis of rental do we pay there?

A. The rental amount is set by the land and tax department of the railroad. As to the method of determining the amount of rental, I am not familiar.

Q. Now, does the Transportation Company make certain

payments to the parent railway in connection with what is generally termed "general expenses," such as general office expenses and attorneys and so forth?

A. Yes, sir.

Q. Now, are there any other payments that flow between the Transportation Company and the Railway Company?

A. Yes, there would be payments made by the Frisco [fol. 281] Transportation Company for any materials, supplies, or parts obtained from the Frisco rail stock or any other specific items furnished to the Transportation Company for its use in truck operations.

Q. But the accounts are kept separately in separate accounts, you being in charge of the Transportation Company accounts?

A. Yes, sir.

Mr. Baumann: Does that clear it up pretty well?

By Mr. Earnshaw:

Q. Well, I am interested in your general service account. Can you tell me a little more of what that covers?

A. I don't believe I know what you mean by "general service account."

Q. General service payments that were just referred to in your answer to Mr. Baumann.

A. The payments made by the railroad to the Frisco Transportation Company?

Q. I assumed it was by the Frisco Transportation Company to the railroad.

A. You mean for rental of properties?

Q. For general overhead.

Mr. Baumann: We call it "general office account."

By Mr. Earnshaw:

Q. The general office account.

A. That is the account designated under the accounting regulations of the Interstate Commerce Commission as "Management supervision, fees, and expenses."

[fol. 282] Q. Does that include accounting?

A. It includes revenue accounting and that portion of

any work they might perform for the Frisco Transportation Company by their office force.

Q. I didn't understand exactly how this payment is based. Is it based on a percentage of something?

A. No, sir.

Q. How is it based?

A. Based on a flat sum per month.

Q. Per month?

A. Yes.

Q. Now, does that include services of executives?

A. Yes, sir; it would.

Q. And would that include traffic executives?

A. That is, except the executives who appear on the pay rolls of the Frisco Transportation Company.

Q. Yes. But it does include some executive—we might call it "service"—provided by the railroad for the motor company?

A. Yes, sir; that's right.

Q. And that would include traffic executives' service?

A. If there were any, that would be true.

Q. Are there any joint traffic officers as between the Transportation Company and the railroad?

A. I am not informed of it. I am not sure about it. I wouldn't be able to answer definitely.

[fol. 283] Q. You would agree, wouldn't you, that there is some traffic activity included in that general office account?

A. I wouldn't agree to it unless I definitely knew it.

Mr. Earnshaw: I don't want to labor this point, Mr. Examiner, but I would like to have the full situation shown.

Mr. Baumann: Just off the record.

Exam. Croft: Off the record.

(Discussion off the record.)

By Mr. Earnshaw:

Q. Mr. Witness, I notice from the Frisco Railway timetable that Mr. Coulter is vice president of traffic of the Transportation Company and chief traffic officer of the railroad. Now, would payments made under the general

office account include some compensation for joint officers of that type?

A. I don't think so. In that particular case I believe that Mr. Coulter appears on the Frisco Transportation Company's pay roll for his portion of the services.

Q. Well, now, of the other people in his office staff, however, that would not be true, would it?

A. If his office staff performs any services for Frisco Transportation Company and they do not appear on the Frisco Transportation pay rolls, the amount paid in a lump sum would include their services.

Q. And there are several individuals, are there not, whose names are shown on page 22 of the Frisco Railroad [fol. 284] folder, who hold positions both for the Transportation Company and the railroad?

A. Yes, sir.

Mr. Earnshaw: Well, to save time, may we offer those two sheets of the folder in evidence, Mr. Examiner?

Mr. Baumann: No objection.

Exam. Croft: Will you separate what you want and offer it?

Mr. Earnshaw: For the benefit of putting this in in the best form in the record, I will offer the entire folder, which is the March 1946 edition of the Frisco Lines passenger timetable.

Exam. Croft: It will be identified—

Mr. Baumann: Mr. Examiner, there is an unnecessary and a lot of useless things in that folder that do not pertain in any wise to this case. We don't desire to restrict counsel to any part of it, but we suggest that if you are going to throw a railroad folder into this thing that we take parts or portions of it. If the purpose is to show that certain officers of the Transportation Company hold office with the St. Louis-San Francisco Railway—

Exam. Croft: Well, the list isn't more than 6 or 8 names there. Can't you just read into the record those who have duplicating positions in both concerns?

Mr. Earnshaw: They have different titles, Mr. Examiner. That's the trouble.

[fol. 285] Mr. Baumann: As a matter of fact, if counsel

wishes we could recess and get together and write out a list and show it that way very readily.

Exam. Croft: Well, it's immaterial to me. I will accept the entire folder if you want it, or you may withdraw it and put in the list.

Mr. Earnshaw: Well, I think for convenience I would desire to put in the entire folder.

Exam. Croft: There would be possibly some expense in reproducing it if the matter goes to court.

Mr. Earnshaw: Well, we will have to participate in that. So I would like to facilitate things by letting the whole folder go in.

Mr. Baumann: Then I am forced to object on the ground that, with the exception of page 1 and page 22, there is no material matter contained in the folder.

Exam. Croft: The objection is overruled. It will be identified and received as exhibit 9-A.

(The folder referred to was marked "Intervener's Exhibit No. 9-A, Witness Essex," for identification and received in evidence.)

By Mr. Earnshaw:

Q. Mr. Essex, do you have the truck-mile revenue of the Frisco Transportation Company for 1945?

A. Yes, sir.

Mr. Earnshaw: I will withdraw that question because [fol. 286] that will appear from the late-filed exhibit.

By Mr. Earnshaw:

Q. You have already stated that you have no break-down of expenses as between exclusive truck operations and joint rail-truck operations. Do you have any break-down of statistics such as vehicle miles, revenues, etc.?

A. No, sir. I have a break-down of revenues only.

Mr. Baumann: And that we already have.

By Mr. Earnshaw:

Q. May we have that break-down of revenue for the same period covered by exhibit 5-A?

A. I don't have that break-down as to the revenue. It's the tonnage on which I have the break-down.

Q. You don't have any of the figures breaking down the revenue at the present time?

A. No, sir; I don't.

Q. Do you know whether or not the Transportation Company's expenses include any commissions to outside parties for the solicitation of freight?

A. It would include any if there were any such expenses.

Q. Well, are there any such expenses?

A. I don't recall any expenses such as that. Just a minute; I will check further.

For the year 1945 there appears an amount of $73.18 for account 4330, "Commission—Agents and Connecting Lines."

Mr. Earnshaw: That's all my questions, Mr. Examiner.

Redirect examination.

[fol. 287] By Mr. Baumann:

Q. You referred to certain joint agents, Mr. Essex. Where are the joint agents located, generally speaking? The Frisco Railroad and Transportation Company joint agents. Where are they located generally?

A. Generally at small agencies.

Q. You mean they are the railroad agent of the town?

A. Yes, sir.

Q. I see. There was reference made as to an amount paid for general services or general office expense.

A. Yes, sir.

Q. Was that amount ascertained through any type of study of the time consumed or anything of that sort?

A. Yes, sir; it was.

Q. Time consumed where?

A. In the revenue accounting department and in the various offices that perform service.

Q. Including the law department?

A. Including the law department.

Q. Now, by "revenue accounting," what do you mean specifically?

A. That refers to the allocation of revenues to the proper accounts and the charges to the agents' or operators' accounts.

Q. In other words, the joint agent at the small rail station acts as an agent for both the railroad and Transportation Company?

A. Yes, sir.

[fol. 288] Q. And he makes his reports to whom? His waybill reports and the like.

A. He would make his waybill reports to the revenue department of the Frisco Transportation Company office.

Mr. Baumann: I believe that's all, Mr. Essex.

By Exam. Croft:

Q. Mr. Essex, I have a question or two with respect to exhibit 8-A, the map. Eastward from Wyandotte there is a black line which has apparently been covered by white ink. Is that supposed to be in or out?

A. That is supposed to be out. That was an error.

Q. How far over is that white supposed to extend?

A. I would have to check that.

Q. In other words, the black line does extend out there as a stub now. Is that the way it should be?

A. Yes, sir.

Q. Westwardly from Neosho?

A. Yes, sir; that's right.

Q. Very well. My copy wasn't too clear.

Now, with respect to a number of your operations, you are now operating subject to the so-called Kansas City Southern restrictions or at least 1 and 5?

COLLOQUY BETWEEN COUNSEL AND EXAMINER

Mr. Baumann: Mr. Examiner, we have no restrictions on any of our operations acquired through purchase.

Exam. Croft: I appreciate that, but that isn't what I said. There are a number of operations shown on this [fol. 289] map which are now being conducted subject to restrictions, are there not?

Mr. Baumann: We have but one short segment in our entire set-up at the present time that's being conducted

subject to the so-called Kansas City Southern restrictions, and that was acquired under a convenience and necessity case. Other than that, all others were through direct acquisition.

Exam. Croft: Do I understand that all of your rights except one segment were acquired by purchase?

Mr. Baumann: Yes, sir.

Mr. Damon: I may make this statement: You may be inquiring as to Sub 15, which runs from St. Louis to Blytheville. That has been eliminated.

Exam. Croft: I have no particular subnumber in mind.

Mr. Damon: For your information, that has been deleted from our set-up. That runs from St. Louis to Blytheville.

Exam. Croft: Well, where is the segment on this map which you are now operating subject to restrictions?

Mr. Damon: Sub 4 is a convenience and necessity application granted by the Commission. That operation covers between Nettleton and Lake City, Ark., and between Walnut Ridge and Datto, Ark., and it is subject to your so-called Kansas City Southern restrictions. That's the only operation on the entire system that is subject.

Mr. La Tourette: Now, can we get this clear? I think you will agree with this, Mr. Damon: That with respect [fol. 290] to the operation from St. Louis to Memphis, which is outlined in red and exhibit 8-A—

Exam. Croft: Temporary operation.

Mr. La Tourette: —that is a temporary authority operation, and presently the proposed report is for denial of the application. That case is up for oral argument on the 15th of April.

Mr. Baumann: There is now pending a proposed purchase of the operating rights of Righter Trucking Company, Inc., in docket No. MC-F-2413, which, incidentally, will be argued for the second time before the Commission on next Monday.

Mr. La Tourette: And then, Mr. Baumann, would you also mention the yellow route from Kansas City down to Fort Smith, shown on exhibit 8-A?

Exam. Croft: He has already explained that that is a leased operation.

Mr. La Tourette: No, it isn't, Mr. Examiner.

Mr. Baumann: Now operating under a lease, but an application to purchase is likewise pending under docket No. MC-F-2529, and that proceeding has now just passed the exception stage and replies.

Exam. Croft: There is a proposed report by the Examiner denying the application.

Mr. Baumann: And I might mention we also have one by an Examiner granting it.

[fol. 291] Exam. Croft: The first one.

Mr. Baumann: The first one; the best one!

Mr. La Tourette: Isn't this also true, Mr. Baumann: That with respect to the Reddish purchase there are certain limitations as to points to be served?

Mr. Baumann: Wait a minute. You are talking about the last proposed report?

Mr. La Tourette: No. I am talking about the Reddish purchase.

Mr. Baumann: So far as I recall, there is a limitation against performing service through from St. Louis to Memphis.

Exam. Croft: I wish that this map showed the docket numbers in some manner related to each segment. But I assume it is impossible to get a map of that character.

Mr. Baumann: It would probably result in too many variations in colors. We will later put in the certificates affecting these and also certain consolidated certificates.

Exam. Croft: That makes it so difficult to check. It's so much simpler if we can put it in certain colors. But I don't know that it makes a great deal of difference if there are no varying restrictions on each segment.

I have nothing further of this witness.

Does anyone else have any further questions of this witness?

If not, you are excused.

We will take a short recess.

[fol. 292] (Short recess.)

Mr. Earnshaw: I have another question for Mr. Essex.

Recross examination.

By Mr. Earnshaw:

Q. Mr. Essex, do you have the applicant's average ton-mile expense for last year?

A. I don't have the average ton-mile expense figured. I have the total ton-miles and the total expenses. The total expenses for the operations for the year 1945 amounted to $2,522,719.80. Ton-miles, revenue freight, for the year 1945 was 45,560,101.

Q. Do you have the amount per ton-mile paid by the Transportation Company to the railroad?

A. No, sir. Ton-miles are not separated between the two types of freight.

Q. Do you have the expense per ton handled? A. I have the cost per ton. For the year 1945 it was $9.15. For the month of December 1945 the cost per ton was $10.47. The cost per ton for January 1946 was $9.87.

Q. And do you know what the corresponding payments by the rail road to the Transportation Company for those periods were per ton?

A. The payment per ton for the year 1945 was approximately $9.

Q. Would you have it for the later months?

A. For the month of January 1946 it was $10.

[fol. 293] Mr. Earnshaw: Thank you very much.

(Witness excused.)

Mr. Damon: Mr. Bryant.

R. C. Bryant was sworn and testified as follows:

Direct examination.

Mr. Damon: Mr. Examiner, this evidence is offered in behalf of our objections on our motion for discontinuance of the proceedings also.

By Mr. Damon:

Q. State your name.

A. R. C. Bryant.

Q. And where do you reside?

A. Springfield, Mo.

Q. Your official capacity with the Frisco Transportation Company?

A. Assistant general manager.

Q. I will ask you if in the years 1939, 1940, and 1941 you were in charge of matters pertaining to tariffs, rates, and other matters with the Frisco Transportation Company.

A. Yes, sir; that is correct. During that period I was in charge of those matters as well as general matters relating to operation. The company at that time was not very large, and our force was, of course, small. So such matters generally came under my jurisdiction.

Q. And have you made an investigation of the cor- [fol. 294] respondence and other matters with relation to Subs 1, 2, 3, 5, 6, and 10?

A. Yes, sir; I have.

Q. And is exhibit 10-A that has been marked by the reporter a true copy of the correspondence that is in the files of Frisco Transportation Company?

A. That is correct.

(The correspondence referred to was marked as "Applicant's Exhibit No. 10-A, Witness Bryant," for identification.)

By Mr. Damon:

Q. Handing you a copy of exhibit 10-A, I will ask you to explain just what that represents.

A. Exhibit 10-A represents an exchange of correspondence generally between myself and Mr. Blanning of the Interstate Commerce Commission, relating to the adoption of tariffs of John Hamm, a line purchased under docket MC-F-618, correspondence relating to consummation of this purchase, adoption notices, the assignment of MFXA numbers, and the participation in tariffs and classifications.

Q. Does this exhibit also include the further compliance order that was issued on March 14, 1939? That shows on sheets 9 and 10.

A. March 14, 1939, the further compliance orders that were issued in this proceeding.

Q. Is there also included in this exhibit an excerpt from the Ozark Truck Lines, Inc., common-carrier application, pages 11 and 12?

[fol. 295] A. Yes, sir; that is correct, under docket MC-15911.

Q. Now I refer you to page 1. Just state what that represents.

A. The matter relates generally to our— It's really a letter of instructions from Director Blanning.

Q. What's the date of it?

A. It's dated January 11. Advising us that—

Q. What year?

A. 1939. January 11, 1939. Advising that we are required to issue and file with the Commission and post for public inspection an adoption notice, adopting all tariffs, powers of attorney, etc., filed with the Commission by or in behalf of the selling carrier. And along with the letter there was enclosed a specimen copy for our guidance in preparing such a document.

Q. What does sheet 2 represent?

A. Sheet 2 is a letter of transmittal dated February 24, 1939, attaching adoption notices covering the adoptions of John Hamm, doing business as Southwest Freight Line, and Joseph D. Cooper, doing business as Southwest Truck Line; the adoption of the tariffs of those two carriers.

Q. Sheet 3?

A. That is the adoption notice itself.

Q. What is the date of the issue and the effective date of the adoption notice?

A. Issued February 24, 1939, and effective on January 3, 1939.

Q. Sheet 4?

[fol. 296] A. Sheet 4 is a letter in connection with the power of attorney to be filed.

Q. From whom and on what date?

A. W. Y. Blanning, dated January 28, 1939.

Q. Page 5?

A. Page 5 is a letter to W. Y. Blanning, dated February 3, 1939, concerning power of attorney in favor of C. F. Jackson.

Q. Was that letter dictated by you?

A. It was and bears my dictation symbol on the left-hand margin.

Q. And did you have authority to sign W. L. English's name?

A. I did, sir.

Q. And you did on occasion?

A. Yes, sir.

Q. Page 6?

A. Page 6 is a letter dated January 18, 1939, to Director Blanning, advising him that the purchase of John Hamm under finance docket MC-F-618 was completed as of January 3 and that related journal entries would indicate that draft covering the purchase price was delivered as of that date.

Q. Page 7?

A. Page 7 is a letter from Director Blanning, dated January 21, 1939, to W. L. English, General Manager, Frisco Transportation Company, acknowledging receipt of letter indicating date of final consummation of purchase, docket MC-F-618, John Hamm.

Q. Page 8?

[fol. 297] A. Page 8 is a letter dated December 29, 1938, from Director Blanning to the Frisco Transportation Company, referring to orders in dockets MC-F-618 and 619, which is the purchase of John Hamm and Joseph Cooper.

The letter also states that we are further advised that the operating rights of J. A. Rose, which we were authorized to acquire under MC-F-619, have been assigned docket No. MC-89913, Sub 2, and that any future correspondence should refer to that docket number.

Q. Just a moment. Does this also refer to the Hamm operation as to assigning a docket number?

A. Yes, it does, in the second paragraph, assigning a docket number to the Hamm purchase—MC-89913, Sub 1.

Q. Page 9 and page 10: What do those represent?

A. A compliance order issued under docket MC-89913, Sub 1, dated March 14, 1939, covering the purchase of John Hamm and setting forth the routes therein acquired.

Q. On page 10 is a note at the bottom of the page. What does that say?

A. "This order embraces the authority applied for under docket No. MC-29652, John Hamm, doing business

as Southwest Freight Line, Joplin, Mo., purchased by the applicant named herein pursuant to finance docket No. MC-F-618, approved November 30, 1938."

Q. And, on page 9, I wish you would read the last para-
[fol. 298] graph on page 9.

A. "And it is further ordered, That the previous order entered in this proceeding describing the authority to which applicant's predecessor in interest has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

"By the Commission, division 5."

Q. Pages 11 and 12?

A. They are an excerpt from the order issued covering the rights of the Ozark Truck Lines, Inc., dated February 19, 1942—

Q. Was the Frisco Transportation Company the successor in interest to that particular application?

A. That is correct.

Q. And that is found in what volume of the Motor Carrier reports?

A. 32 M. C. C. 459.

Q. And read into the record the statement there that's covered by this order.

Exam. Croft: I don't believe that's necessary.

Mr. Damon: You don't need that?

Exam. Croft: I have been very liberal in letting you refer to this, but I don't believe you need this.

By Mr. Damon:

Q. I will ask you whether there is some reference on page 11 to the purchase by the Frisco Transportation Company of the Ozark Truck Lines, 35 M. C. C. 255. In
[fol. 299] this report and order is there some reference to that purchase?

A. Yes, sir; there is.

Q. And that's set out here in this exhibit?

A. Yes, sir.

(Certain correspondence was marked as applicant's exhibits Nos. 11-A thru 15-A, Witness Bryant, for identification.)

Mr. Damon: Now, I have these other exhibits—11-A, 12-A, 13-A, 14-A, and 15-A—that contain very much in similar manner information relative to the adoption notices, letters from Director Blanning, and correspondence. If you care to, I can cover each one individually.

Exam. Croft: I think that each of them speaks for itself, Mr. Damon; and, unless there is something important about any of them that you wish to draw our attention to, they need not be reviewed.

By Mr. Damon:

Q. I hand you exhibits Nos. 11-A, 12-A, 13-A, 14-A, and 15-A. Did those come from the same source of information as did exhibit 10-A?

A. That is true, they did.

Q. From the records in your files?

A. From the records in our files.

Q. I refer you to exhibit 11-A, pages 13 and 14. On page 14 there is a note contained at the bottom of the page. Just state what that says.

A. "This order embraces the authority applied for under [fol. 300] docket No. MC-66229, J. A. Rose, Paris, Tex., purchased by the applicant named herein pursuant to finance docket No. MC-F-619, approved November 30, 1938."

Q. Pages 15 to 19, inclusive: State what that represents.

Mr. Reeder: Aren't these in the record, Mr. Damon?

Mr. Damon: Well, I think it is a matter for the Examiner to be acquainted with. This covers operation one way. And then a 207 proceeding was granted in the other direction, giving us intermediate points back.

Mr. La Tourette: Well, don't these orders all show that, Mr. Damon? Can't you point that out on brief?

Mr. Damon: I just want him to tell what it is. I am not going to go into it in detail.

Exam. Croft: Well, it is obvious that this is merely a copy of the Joint Board's report and order. We are all familiar with it.

Mr. La Tourette: It shows on its face what it is.

By Mr. Damon:

Q. Is that what that represents?

A. Yes, sir; it is an order of the Joint Board, issued in connection with an application for a certificate of convenience and necessity.

Q. Now, in exhibit 12-A at page 10 there is a notation at the bottom of that page. What does that say?

A. "This order embraces the authority applied for under docket No. MC-20440, Joseph D. Cooper, doing business as [fol. 301] Southwest Truck Line, Joplin, Mo., purchased by the applicant named herein pursuant to finance docket No. MC-F-578, approved November 30, 1938."

Exam. Croft: Mr. Damon, if you want to invite the Commission's attention to parts of these, I am perfectly satisfied to have you do it rather than to have you do it by question and answer.

Mr. Damon: Well, I would like to call your attention, Mr. Examiner, to this: On exhibit 13-A I call your attention to the footnote at page 11, which states:

"This order embraces the operations purchased by the above-named applicant from Joseph W. Parker, doing business as J. W. Parker Truck Line, Blytheville, Ark., docket No. MC-71901, pursuant to No. MC-F-678, approved April 12, 1939."

Also included in this exhibit is an excerpt from the report of the Commission, division 5, in docket No. MC-89913, Sub-No. 11, "Frisco Transportation Company Common Carrier Application," successor in interest to the Reddish Truck Line.

Mr. La Tourette: Well, I think those comments about the origin of the authority and everything are generally set out in the order when the Commission issues it, Mr. Damon.

Mr. Damon: Well, it is for the benefit of the Examiner to have the information.

Exam. Croft: Well, I still think we can read it here. It is right in the exhibit.

[fol. 302] Mr. Damon: I am just making reference to it.

The other exhibits are very similar, 14-A and 15-A, to those described in 10-A to 13-A.

Will you mark this?

(The document referred to was marked as "Applicant's Exhibit No. 16-A, Witness Bryant," for identification.)

By Mr. Damon:

Q. Now, Mr. Bryant, I refer you to exhibit No. 16-A, marked by the reporter, and will ask you to state what that represents.

A. Exhibit 16-A represents copies of certificates which have been issued by the Commission in the six cases here involved.

Q. And the dates of those are shown on the index, is that right?

A. Yes, sir; that is correct. The date of issuance is shown on the index.

Q. Page 1 is a certificate issued by the Commission on the 2d day of March 1940 covering what route?

A. Between Paris, Tex., and Hugo, Okla., over Texas Highway 24 and Oklahoma Highway 2.

Q. And return over the same route?

A. That is correct.

Q. Serving all intermediate points?

A. Yes.

Q. Service is not authorized from Hugo to Paris?

A. Not authorized over the return route from Hugo to Paris.

[fol. 303] Q. Pages 2 and 3 is the certificate issued to the Frisco Transportation Company on the 31st of March 1942, is that correct?

A. Yes, sir; that is correct.

Q. Covering what routes?

A. Between Paris, Tex., and Hugo, Okla., service being authorized to and from all intermediate points.

Q. On page 3 there is a note at the bottom of that page. Please state what that is.

A. "This certificate also embraces docket No. MC-89913, Sub 2, assigned to cover the operating rights purchased by the above-named carrier from J. A. Rose, docket No. MC-66229, pursuant to MC-F-619, approved November 30, 1938."

Q. And page 4, certificate issued to the Frisco Transportation Company, designated MC-89913, Sub 1, issued on the 31st day of March 1942. This certificate is also covered by pages 4 and 5. Are the routes involved in this proceeding shown on either pages 4 or 5?

A. Yes, sir. The route between Joplin and Miami is shown on page 5, and the routes between Joplin and Carthage are likewise shown on page 5.

Q. And there is a note at the bottom of page 5. What does that state?

A. It states that the certificate "also embraces the operating rights purchased by the above-named carrier from [fol. 304] John Hamm, doing business as Southwest Freight Lines—"

Exam. Croft: Let's avoid reading those long routes. We are all familiar with these—a succession of certificates superseding prior certificates, culminating in a consolidated certificate. I think your last one was issued—

Mr. La Tourette: I think it is all very self-explanatory, Mr. Examiner. All we need do is read it.

Mr. Damon: The only purpose I wanted to show is that this certificate covered both Subs 5 and 6. The purchase of Hamm—

Mr. La Tourette: Well, that will be explained in the certificate itself, the origin of the authority. It is always done by the Commission.

Mr. Damon: Sub 1, rather.

By Mr. Damon:

Q. Sub 5 of MC-89913. A certificate issued to the Frisco Transportation Company on the 18th day of April 1942 in Sub 5. I will ask you generally if that covers part of the proceedings involved herein; pages 6 and 7 under Sub 5.

A. Yes, sir; it does. It involves the purchase of the J. W. Parker Truck Line and the Tolson Transfer Company and the Blake Truck Line.

Q. And that's generally an operation between Walnut Ridge and Memphis?

A. That is correct.

Q. And the certificate on page 8 covers document No. MC-89913, Sub 10, issued on the 13th day of June 1940. [fol. 305] And what route does that cover?

COLLOQUY BETWEEN COUNSEL AND EXAMINER

Mr. La Tourette: Now, Mr. Examiner, I am going to object to further burdening the record with explanations of documents in this exhibit that are perfectly self-exaplanatory and that we can all read and that will be a part of the record.

Exam. Croft: Mr. Damon, I don't want to embarrass your presentation, but, really, we don't need any of this you are putting in now. The documents speak for themselves, and I am sure that we all understand them. And the index shows the subnumbers.

Mr. La Tourette: My only purpose is that I think it's totally unnecessary, and I am sure it won't injure the case of the Frisco Transportation Company if all these matters are not read in the record because they are in the exhibit, and all we need to do is refer to the exhibit and read it.

Exam. Croft: If it were going to prejudice you in the least I certainly would not discourage it, but I don't believe it is necessary to go over these.

Mr. Damon: There are some matters in the footnotes that I thought might need some explanation.

Mr. La Tourette: Then I am going to object, Mr. Examiner, because the footnotes are all explanatory, and we can read them. They show the origin of the operation when it is embraced in a certificate, and we don't have to have that explained to us. We are all familiar with it. [fol. 306] And I make a formal objection to proceeding in this fashion.

Mr. Reeder: These are matters for argument on brief if explanation is required.

Mr. Damon: Well, if there is objection I don't care to burden the parties any further in making reference to them. However, we expect to offer them in evidence.

Exam. Croft: Surely.

Mr. Damon: That's all.

Mr. La Tourette: Maybe I should address this question to counsel; it is just a general question.

I notice in some of the orders— I have in mind exhibit 10-A on page 9. The last paragraph of that order was read, and it refers to a previous order that was entered and vacated and set aside. Are those previous orders included in the various exhibits, Nos. 10-A to 15-A, inclusive; do you know, Mr. Damon?

Mr. Damon: Those previous orders were issued in the "grandfather" proceedings of the predecessor there, and we don't have copies of those.

Exam. Croft: They are the compliance order or the certificate previously issued to your predecessor?

Mr. Damon: Yes. Not the certificate but a compliance order. A certificate hadn't been issued at that time.

Mr. La Tourette: It is simply a change in the name of the party in whose name the order is issued.

[fol. 307] Exam. Croft: I think that's all it amounts to.

Mr. Earnshaw: Then it will be understood, Mr. Examiner, that we will be free to refer to any of the orders or documents of this type in any of these involved dockets?

Exam. Croft: You may refer to anything that's in this record. I don't know whether those proceedings are in this record or not.

Mr. Baumann: Are you speaking of the proceedings in our vendors' "grandfather" rights, Mr. Earnshaw? Is that what you have in mind?

Mr. Earnshaw: I would have reference to what is before the Commission in the finance dockets involving the particular "grandfather" rights. I believe that it would be in the finance docket.

Exam. Croft: I think the orders that you have apparently in mind would be found in finance dockets; and, of course, they are reopened and a part of this consolidated proceeding. But beyond that I wouldn't encourage you to go.

Mr. Earnshaw: That's all, Mr. Examiner.

Mr. Damon: I would like to call attention to the certificate issued on the 20th day of December 1943 in that on page 16 and I believe 17 (of exhibit 16-A) the routes shown in there between St. Louis, Mo., and Blytheville, Ark.,

which is generally known as Sub 15, have since been deleted by the Commission from that certificate.

[fol. 308] Exam. Croft: You mean there has been a reissued certificate?

Mr. Damon: No, there has been no reissued certificate. But they have—

Mr. La Tourette: Isn't this true, Mr. Damon: That there was a petition filed to revoke the authority in MC-89913, Sub 15, which was an application filed under section 207 for coordinated authority between St. Louis and Blytheville, the application originally having been extended to Memphis, I think. Or, no, it was Blytheville only.

And that authority, Mr. Examiner, included key-point restrictions. There were a number of key points named in the certificate. The Frisco Transportation Company, after the certificate was issued, filed a proceeding to have the certificate revoked; and, pursuant to that petition, the authority in MC-89913, Sub 15, was revoked and deleted from the certificate consolidated in the Frisco Transportation Company.

Mr. Damon: That is the explanation; that is correct.

Mr. Reeder: Will you tell us exactly which of the routes that is and how far it goes so we may mark them on this exhibit, Mr. Damon?

Mr. Damon: On page 16?

Mr. Reeder: Right.

Mr. Damon: Well, it starts with St. Louis to Blytheville and runs over to page 18 in the middle of the page.

[fol. 309] Exam. Croft: You mean all those preceding routes which were subject to the restriction are now out?

Mr. Damon: That's right.

That's all I have.

Exam. Croft: You may cross-examine.

Mr. La Tourette: I have no questions.

Mr. Reeder: No questions.

Exam. Croft: Mr. Earnshaw?

Mr. Earnshaw: I am still curious, Mr. Examiner, as to the other witnesses to be offered by the applicant. There is certain information we would like to have.

Exam. Croft: It is virtually 12:30 now. Let's recess until 2 o'clock, and maybe you can get the information you want in the meantime.

Mr. Baumann: Are they finished with this man?

Exam. Croft: I gather they are not. Mr. Earnshaw may have some questions, depending upon the answers to his questions.

Mr. Earnshaw: Well, off the record.

(Discussion off the record.)

Exam. Croft: We will recess at this time, then.

(Whereupon, at 12:30 p. m., a recess was taken until 2 p. m. of the same day.)

Afternoon Session. 2 p. m.

Exam. Croft: Let's proceed.

Mr. Earnshaw, do you have some more questions of this witness?

Mr. Earnshaw: I wondered if counsel for applicant would be able to state at this time whether or not there is to be any more direct testimony.

Mr. Baumann: On behalf of the Frisco Transportation Company, we desire to state that, following the completion of Mr. Bryant's cross-examination, we intend to rest on our motion and our objections to the effect that the Commission is without power to restrict the certificates generally speaking.

Exam. Croft: You mean you are not going to give us any rail operations on which we might base past conditions?

Mr. Baumann: There is some considerable doubt in my mind. First of all, there's only 280 miles out of 4,800 miles involved, which, of course, means a very small part of a big operation. Then the other phase of it is that your proposed report is out the window, as I understand it, and we are somewhat at a loss to understand just what conditions might be imposed, particularly in view of the fact that full hearings were had originally and the matter of the Frisco Transportation Company and its acquisitions has been before this Commission on numerous occasions.

Now, if the Examiner would care to indicate the type of [fol. 311] testimony that would be desirable, it is altogether

possible that we might be able to arrange by in the morning for the necessary witnesses to be present regarding the rail operation and things of that nature. But, frankly, under the present state of the record, we intend to rest on the motions.

Exam. Croft: Well, it is my assumption that if the Commission finds that restrictions are desirable, and if it concludes that it has authority to impose them at this time, they will put in restrictions similar to the so-called Kansas City Southern restrictions, including the condition 3, naming either key points or requiring an immediately prior or immediately subsequent rail haul.

And, as a basis for those restrictions, I think it is very important, and I am going to ask you before this hearing closes, to put in evidence as to the manner of the rail operations particularly. I want to know where they originate their merchandise cars, where they set them out, break bulk, and the character of the rail-coordinated-motor operation. In other words, I want information on which we can impose a workable restriction, and I should think it was to your interest as well as ours to supply it; and, in so doing, you will not in any way jeopardize your position that it is too late to impose such restrictions.

Mr. Baumann: Would it inconvenience the Examiner too greatly if we arrange for such testimony the first thing [fol. 312] in the morning?

Exam. Croft: No; that's agreeable to me.

Mr. Baumann: Because, as the thing has turned, we wouldn't be prepared to follow Mr. Bryant on that, follow Mr. Bryant's testimony with that kind of testimony, because it is quite involved when you consider a portion of an extensive operation such as we have here.

Exam. Croft: Well, in that connection I might say this: That possibly the authority, if any, of the Commission to impose restrictions is greater in some of these earlier finance cases than it is in later ones. That being true, it may be that the conditions imposed in these cases would be affected by the entire picture. And I want not only these short operations which may be involved in this case, but I would like to have a complete picture of the—

Mr. Baumann: Generally the substitute-service operation?

Exam. Croft: —of the entire area adjacent to each of these operations.

Mr. Baumann: In effect, that would affect almost the entire system.

Exam. Croft: Well, I suppose that's true. I think the operations out of Memphis are rather substantial; I assume that they are. And if the Commission has authority to restrict them, we should have complete information. By the same token the effect on connecting operations, of [fol. 313] the operations here involved in the Joplin area, may be more significant than those individual operations would be standing alone.

I believe it's to your own benefit, as well as to the convenience of the Commission, for you to anticipate at least the possibility of an adverse finding on your objections and give us the information that we need beyond that point.

Mr. Damon: Do I understand that information will be given under protest?

Exam. Croft: Without embracing or weakening—

Mr. Earnshaw: Without prejudice.

Mr. Damon: Without waiving any of our rights?

Exam. Croft: Certainly.

Mr. Baumann: Now, just to repeat—and I want to be sure because I don't want to get any unnecessary manpower up here and all that—what you want is a complete picture of the Frisco Railway's joint motor-rail service and merchandise service?

Exam. Croft: That's correct.

Mr. Baumann: That's what you want. Where they break bulk and where these cars moved. And, of course, we are going to put in how much saving there may be incidental to that.

Exam. Croft: And I think it is also desirable to have information as to the truck movements from the distribution and assembly points because if key-point restrictions appear to be appropriate, for instance, I wouldn't want to put them in in a manner to embarrass or to impede in any way any substituted or auxiliary or legiti- [fol. 314] mate auxiliary and supplemental service.

Mr. Baumann: We are at all times speaking about the joint rail-truck service?

Exam. Croft: That's right. I want both sides of it, however.

Mr. Baumann: What you would need there would be a rail operating witness in charge of what we call the merchandise schedules, who is familiar with the rail operations as well as where we break bulk and where the Transportation Company takes it up and carries it to destination. That's the type of thing you want?

Exam. Croft: That's right.

Mr. La Tourette: And you also want to know in what manner the Frisco Transportation Company is operating in so-called substituted service for the rail line for the entire length of the haul of the shipment?

Exam. Croft: Well, I have indicated that I think the entire picture is more or less essential to the imposition of a condition affecting any part of it. If you restrict a little segment here which is an essential part of a long haul, you might as well restrict the long haul.

Mr. La Tourette: I didn't know whether Mr. Baumann understood that the Examiner's thought was that you wanted information as to what extent the motor haul is substituted in its entirety for the rail haul.

[fol. 315] Exam. Croft: Oh, I see what you mean. Where there may be no prior or subsequent movement by rail?

Mr. La Tourette: Yes. Take, for illustration, in looking at exhibit No. 8-A, an operation from St. Louis to Oklahoma City. I assume the Examiner would want to know if it's the function of the Transportation Company, at the election of the Frisco or the Transportation Company itself, to perform an exclusive motor haul from St. Louis to Oklahoma City on freight that's received on rail bills of lading and billed at rail rates on a rail bill.

Exam. Croft: Well, I have already indicated that any conditions that may be imposed would be such as to prevent that kind of a movement except as between local points relatively near. There are legitimate instances when an all-rail movement is justified, and, in fact, the key-point restrictions contemplate that.

Mr. La Tourette: You mean where there may be an all-motor movement justified?

Exam. Croft: Yes. Excuse me. An all-motor movement.

And I will leave it to Mr. Baumann to point out those conditions to us or those places where an all-motor movement is justified in auxiliary and supplementary service.

Mr. Baumann: I think we can have such a man available in the morning.

Exam. Croft: Very well.

[fol. 316] Mr. Baumann: He would probably be in position to give you a pretty good lay-out of it. I mean by that, I would get the man who was in charge of what we call "merchandise schedules" with the railroad and who makes up those schedules and tells where the truck takes over and where the rail stops.

Now, do you think you have sufficient testimony in regard to the truck operations if they are conducted as regular, common-carrier through operations? Is there any necessity for any explanation as to that?

Exam. Croft: Well, I have no knowledge of it, and I don't imagine that it's in these records. It is my understanding, though, following Mr. La Tourette's statement, that you do conduct some substantially long-haul all-motor operations at either motor or rail rates, depending on how it is billed.

Mr. Baumann: The question of the length of the rail haul is something different.

Exam. Croft: The question of the length of the motor haul.

Mr. Baumann: I am talking about the haul of rail freight at any substantial length is different than hauling motor freight a substantial length.

Exam. Croft: I don't believe that the Kansas City Southern restrictions contemplate any excessively long movements of rail freight by motor.

Mr. La Tourette: I thought this record should illustrate what the Transportation Company does in the way [fol. 317] of an exclusive motor haul; whether it is an operation as a so-called independent motor carrier, motor bill of lading, at motor rates, as well as where it is substituted—

Exam. Croft: I think that is desirable, Mr. Baumann.

because I think the practice is very questionable, excluding the question of whether you can do it lawfully under your certificate. I think it is questionable whether you should be permitted to do it. And, therefore, the fact as to what you are doing is pertinent. Now, you want to have a Transportation Company witness, operating man, that would know what those practices are as well as a railroad operating man.

Mr. Damon: Well, we will have to look into it. These are all suggestions on the part of the Examiner.

Exam. Croft: Of course, I can't compel you to, but I am making a formal request for that kind of information.

Mr. Damon: Well, you will certainly get that, even if we do it under protest.

Mr. Baumann: Will it be all right to have those men here in the morning?

Exam. Croft: Yes.

Mr. La Tourette: Mr. Baumann, will the witness be in position to state also—I assume he will—the conditions under which rail freight on a rail bill of lading and a railroad bill at rail rates is transported exclusively by truck? I assume he will be.

[fol. 318] Mr. Baumann: May we be off the record?

(Discussion off the record.)

Exam. Croft: On the record, then.

Is there anything further that needs to be added with respect to these witnesses tomorrow?

Mr. La Tourette: It might be helpful— We did this in one case in a cooperative effort. Counsel for the Frisco and myself in the Mo.-Ark. Transportation Company acquisition, No. MC-F-1518, gave the Commission a picture of the independent motor-carrier authorities in these areas. By agreement we worked up such a statement and submitted it. That is with respect to the over-all picture of the Frisco Transportation Company operations.

Exam. Croft: Now you are talking about the independent motor carriers?

Mr. La Tourette: Yes. If that would be helpful, why, we might work out some detail.

Mr. Damon: The mere fact the old certificate doesn't show what service they are rendering.

Exam. Croft: Well, conceivably I could be wrong—I have been wrong lots of times—but I don't really see the materiality of evidence in this proceeding as to independent motor-carrier operations. I don't think there is any proposal or any thought in anyone's mind of doing more than at most restricting the certificates which the Frisco now [fol. 319] holds. And the propriety of those restrictions doesn't seem to me to depend upon the character of the independent motor-carrier competition. Now, if anyone disagrees with that, I would be glad to have you—

Mr. La Tourette: I think possibly the Examiner is right on that.

Mr. Baumann: Let me ask one more question. When you speak of these restrictions, does that contemplate the complete elimination of the handling of what is called motor-carrier freight at motor billing at motor rates, the complete elimination out of all these operations?

Exam. Croft: You put me in an embarrassing position, Mr. Baumann. I can't speak for what the Commission would do.

Mr. Baumann: Well, is that within the scope of what the Commission might do?

Exam. Croft: I would say very definitely that it is within the possibilities, if the Commission concludes that it has authority to do so.

Mr. Baumann: I am merely trying to find out.

Exam. Croft: Well, I would say that I would think that it is within the bounds of probability if the record develops as I expect it will.

Mr. Damon: May I ask a question?

Exam. Croft: Surely.

Mr. Damon: Does the Examiner have any objection to making these witnesses his own witnesses? I ask this [fol. 320] question for the purpose of determining certain matters. In other words, if these witnesses were here, why, the Examiner could make them his own witness.

Exam. Croft: I can't make them the Commission's witness very well.

Mr. Baumann: May I suggest, since it is so thoroughly understood to be in protest and without prejudice to our motion, perhaps we can arrange to put in a running

statement for the guidance of counsel who handle these men? And I think we know what the gentlemen on the other side of the table would like to start out with, anyway, and the issue will have to be ultimately determined. So I think we can carry through, it being understood that they are always under protest and the entire record from the time we close our motion is under protest.

Exam. Croft: Very well.

Mr. Earnshaw: That is agreeable to us.

Mr. La Tourette: I think that's correct, Mr. Baumann; that we understand you are putting this in in view of your position in the case.

Mr. Baumann: That's right.

Exam. Croft: Is there anyone opposed to that understanding?

Let the record show no response.

Very well. I think, then, we are ready to go ahead with this witness.

Has anyone any further questions in view of the agree-
[fol. 321] ment as to the testimony to be offered later?

Cross-examination.

By Mr. Earnshaw:

Q. Are you in charge of solicitation and traffic activities, Mr. Bryant?

A. No, sir; I am not. In fact, my association with the truck operation has been rather general for the last 5 years. I have been operating the bus line during the war period, and, therefore, my knowledge of the truck operation is quite general.

Mr. Earnshaw: Well, then, I will have no questions. Thank you.

Exam. Croft: Any further questions of this witness?

Nothing on redirect?

You may be excused.

Exam. Croft: Now, is there anything further at this time?

(Witness excused.)

Mr. Baumann: Nothing, sir, except we would like to have a ruling on our motion. And I now tender into the record exhibits 1-A to 16-A, inclusive.

Exam. Croft: Except 9-A. That was Mr. Earnshaw's exhibit.

Exhibits 1-A to 16-A, except 9-A, will be received.

(Applicant's exhibits Nos. 1-A thru 8-A, Witness Essex, and applicant's exhibits 10-A thru 16-A, Witness Bryant, were received in evidence.)

Exam. Croft: Now, my position on your motion and objections is this: If you want a ruling at this time it will [fol. 322] have to be adverse. Otherwise I will reserve the ruling until later; whichever you like.

Mr. Baumann: For practical purposes, I don't think it would make a great deal of difference either way.

Exam. Croft: I would just as soon— In fact, I would prefer to reserve the ruling until we have an opportunity to brief the question and other questions also.

Mr. Earnshaw: May I offer exhibit No. 9-A, Mr. Examiner?

Exam. Croft: It has been received.

Mr. Baumann: Under protest.

Exam. Croft: Has anyone else anything to offer this afternoon that we can go ahead with?

Mr. Damon: Mr. Examiner, Mr. Essex has very important matters to take care of tomorrow, and, if they have no further questions, he would like to be excused.

Exam. Croft: Does anyone anticipate any need for Mr. Essex tomorrow? You may be excused, Mr. Essex.

Then I gather that no one else has anything more they are in position to offer this afternoon.

I am going to recess until a little earlier than the usual hour; at least, 9 o'clock tomorrow morning. Or would anyone care to come earlier?

Mr. La Tourette: I will be guided by the Examiner's views.

Exam. Croft: How much time are we going to require tomorrow?

[fol. 323] Mr. Baumann: Ordinarily, Mr. Examiner, speaking from past experience, I would say approximately an hour for each of those witnesses.

That's a good average, isn't it?

Mr. La Tourette: I think so.

Mr. Baumann: And, of course, the cross-examination has many ramifications from there on!

Exam. Croft: Well, we ought to be able to finish relatively early even if we come at 9. We will make it at 9.

(Whereupon, at 2:25 p. m. an adjournment was taken until 9 a. m., Tuesday, April 9, 1946.)

[fol. 324]

* * * * * * *

Room 202, Hotel Pickwick,
Kansas City, Missouri,
Tuesday, April 9, 1946.

Met pursuant to adjournment, at 9:00 a.m.

BEFORE:

W. T. Croft, Examiner.

APPEARANCES:

(As heretofore noted.)

[fol. 325] PROCEEDINGS OF APRIL 9, 1946

Exam. Croft: Shall we come to order, please?

You may resume, Mr. Baumann.

Mr. Baumann: Mr. Examiner, in line with the request made yesterday for the development of certain data in this record, we will present Messrs. English and Gleaves, who, I believe, are capable of giving the information desired, with the understanding, of course, that it is being done involuntarily on our part, that it is subject to the protests and objections registered yesterday and further subject to a running objection as to materiality and relevancy in this

proceeding. If that's understood with all the parties, we will proceed.

Exam. Croft: That's understood. I don't like the word "involuntary." I would rather say "without prejudice."

Mr. Baumann: Let's make it "without prejudice," as we said in our objections, to any exceptions that may be raised hereafter and that have heretofore been raised.

Exam. Croft: That's fine.

Mr. Baumann: Mr. Gleaves.

V. B. GLEAVES was sworn and testified as follows:

Direct examination.

By Mr. Baumann:

Q. Will you please state your name?

A. V. B. Gleaves.

Q. Your occupation and address?

[fol. 326] A. Assistant superintendent of transportation for the Frisco Railway Company, Springfield, Mo.

Q. How long have you been employed by the Frisco Railway and in what capacities?

A. Twenty-two years in various capacities, quite a number of them; but the last 4 years in the present position.

Q. Has your entire experience been substantially in the operating and transportation sections of that railroad?

A. Entirely in that department.

Q. In your work, Mr. Gleaves, is it one of your duties to look after the establishment and maintenance of merchandise cars, so-called?

A. It is.

Q. Now, with respect to these merchandise cars, you make up certain schedules depending upon traffic, do you not?

A. Yes, sir.

Q. You have before you a copy of exhibit 8-A, which shows not only the lines of the Frisco Transportation Company but also the Frisco Railroad. Can you tell me what merchandise cars you run out of St. Louis that carry so-called break-bulk freight or freight moving in coordinated rail-truck service?

A. We had as of yesterday scheduled cars to Amory, Miss., Blytheville, Ark., Chaffee, Mo., Afton, Okla., Dallas, Tex., Fort Smith, Ark., Hayti, Mo., Joplin, Mo., Madill, Okla., Memphis, Tenn., Oklahoma City, Okla., Springfield, [fol. 327] Mo., Tulsa, Okla., and Wichita, Kans.

Q. Those are out of St. Louis. Now, out of Kansas City what cars?

A. Afton, Okla., Joplin, Mo., Oklahoma City, Okla., Memphis, Tenn., Springfield, Mo., Tulsa, Okla.

Q. Out of Memphis, Tenn., what cars did you operate as of yesterday?

A. Amory, Miss., Chaffee, Mo., Dallas, Tex., Hayti, Mo., Kansas City, Mo., Oklahoma City, Okla., St. Louis, Mo., Springfield, Mo., Tulsa, Okla.

Q. Now, out of Dallas, Tex., what merchandise cars or schedules did you operate?

A. We operate scheduled cars to Springfield, Mo., and Tulsa, Okla.

Q. Out of Wichita, Kans., what scheduled cars did you operate as of yesterday?

A. Springfield, Mo.

Q. Out of Tulsa, Okla., what scheduled cars did you operate as of yesterday?

A. From Tulsa to Ada, Okla., Dallas, Tex., Oklahoma City, Okla., Springfield, Mo., St. Louis, Mo.

Q. From Oklahoma City what scheduled cars did you operate as of yesterday?

A. Tulsa, Okla., and Springfield, Mo.

Q. Now, out of Springfield, Mo., what scheduled mer- [fol. 328] chandise cars did you operate as of yesterday?

A. Kansas City, Mo., Madill, Okla., Memphis, Tenn., Oklahoma City, St. Louis, Mo., Tulsa, Okla., Jonesboro, Ark., Wichita, Kans., Dallas, Tex.

Q. Now, were there some other points from which you operated certain scheduled merchandise cars as of yesterday?

A. Yes. We had cars out of various other places. I understand now you are just talking about cars that contained freight that will receive subsequent handling, sort of break-bulk cars that would receive subsequent handling in truck service. I am not including those destined to territories where we don't have a truck line.

Q. I am merely talking about that type of car which contains freight which will ultimately be delivered in substitute service by Frisco Transportation Company or might contain freight which has been received from Frisco Transportation Company, handled in substitute service, or some other independent motor carrier performing substitute service. That's the type of car we are talking about.

A. Well, we had break-bulk cars out of Amory, Miss., to Memphis, Tenn., Springfield, Mo., and St. Louis, Mo.

Cars out of Birmingham, Ala., to Amory, Miss., Kansas City, Mo., Memphis, Tenn., St. Louis, Mo., Springfield, Mo., Tulsa, Okla., Oklahoma City.

Q. Now, Birmingham, Ala.: Is that served by Frisco [fol. 329] Transportation Company or not?

A. No; no, sir.

Q. Will you just explain a little why you say that type of car is involved or is the type we are talking about now?

A. Of course, out of Birmingham those cars— Well, take the car to Amory. It contains l. c. l. merchandise for Amory proper. It contains merchandise that will transfer to other cars at Amory and continue on by rail, and it contains freight that will move out of Amory in substitute service by truck. The same is true of all these other destinations.

Q. Are there any other origin points where you might have run those kind of cars as of yesterday?

A. Enid, Okla., to Tulsa, Okla.; Fort Smith, Ark., to Springfield, Mo.; Fort Smith to Tulsa, Okla.; Fort Worth, Tex., to Madill, Okla.; Mount Vernon, Mo., to Springfield, Mo.,—

Q. And how is substitute service handled in the reverse direction there and by whom?

A. Handled by Campbell "Sixty-Six" Express from Springfield to Mount Vernon in substitute service.

Q. All right.

A. —Muskogee, Okla., to Tulsa, Okla.

Q. Now, Mr. Gleaves, you stated—

A. There's one other here.

Q. Pardon me.

A. Pensacola, Fla., to Memphis, Tenn.

[fol. 330] Q. I would like to have you explain a little as to the Pensacola, Fla., to Memphis, Tenn., car. Why are you mentioning that in connection with this matter?

A. Well, that's a break-bulk car. We have quite a movement out of Pensacola, and it goes to Memphis, and some of it is destined Memphis. Some of it goes to connecting lines at Memphis. Some of it transfers to rail cars, and some of it transfers to trucks.

By Exam. Croft:

Q. Where do you receive that car on your line?

A. We originate it.

Mr. Baumann: Pensacola is on our line.

Mr. Earnshaw: Pensacola is on the map.

Exam. Croft: That's right. I didn't realize you went that far east.

Mr. Baumann: Pensacola is on our line.

By Mr. Baumann:

Q. Is this same thing generally true, Mr. Gleaves, with respect to cars originating at such points as, well, even St. Louis? Do you load those cars with respect to whether they contain joint rail-truck freight or do you load them to get the maximum use out of the car, regardless of the original origin of the freight?

A. Well, as a general rule, we make the car according to the destination, and whether we receive the freight at St. Louis or from connecting lines we put it in the same car. Or whether some of it comes in by truck in substitute [fol. 331] service from other points? Is that your question?

Q. Yes. I want to know what guides your loading a car for any particular point.

A. The destination.

Q. And do you also take in consideration the services of Transportation Company beyond that point in loading that car? When you load a car on Springfield, for instance, would you perhaps put something in that car destined to Joplin or some other point in the Tri-State area, to be fanned out by Frisco Transportation Company?

A. Yes. Well, as far as St. Louis is concerned, we have a sufficient volume of business up there at St. Louis that we can load a direct car with nothing in it but freight that will move in substitute service out of Springfield. Now, the

reason we do that is because it gets down to Springfield on the "Flash"—

Q. What do you mean by the "Flash"?

A. That's our fast merchandise freight train.

—along about 4:30 a. m. This car is spotted immediately, unloaded, the l. c. l. is transferred to truck, and these various trucks fan out in all directions out of Springfield for early first-morning delivery out of St. Louis.

Of course, we also have other cars that contain other freight for Springfield proper and transfer, but it just so happens we have sufficient business out of St. Louis that we [fol. 332] put the truck business in a separate car. But at other locations we just load it all in the same car if the car will hold it.

Q. Now, when you say "truck business," you mean the freight which will be delivered by Frisco Transportation Company in substitute service?

A. Yes, sir.

Q. All right, sir. Now, Mr. Gleaves, in your long transportation experience do you make many scheduled changes in these merchandise cars?

A. Yes, we make quite a number. Anywhere from, I would say, 10 to 200 a month.

Q. And do they affect the destination or the so-called break-bulk point of that car?

A. Most times they do. I mean, quite often they do. We put on cars and we take off cars. There are a lot of reasons why those changes are necessary. We have to change these schedules constantly as conditions change.

Exam. Croft: May I interrupt at that point?

By Exam. Croft:

Q. Now, take these cars as of yesterday: Will similar cars be destined to the same points today?

A. Yes, sir.

Q. In other words, the scheduling of these cars as of yesterday was a fixed pattern?

A. It's fixed.

By Mr. Earnshaw:

Q. Well, may I ask, Are all these daily cars? Are all [fol. 333] these cars daily?

A. Yes. They are scheduled daily. Some of them can't operate daily on account of the tonnage, and others we might operate 3 or 4 cars on the same schedule.

By Exam. Croft:

Q. Now, did you say that you made many changes, ranging from 10 to 200 a month? Did I understand that?

Mr. Baumann: Ten to one hundred, wasn't it?

Mr. La Tourette: Two hundred.

Mr. Baumann: Did he say 200?

By Mr. Baumann:

Q. Can you give us an idea how many changes you made last month and back it up a little bit? How many changes did you make about last month?

A. I would say we made at least 150.

By Exam. Croft:

Q. Now, what do you mean by "change"? You merely drop a schedule one day or you abandon the practice of operating that schedule and operate it some other way?

A. No, sir. When we make a change such as I mentioned we call it a permanent change. However, there isn't much permanence to these merchandise schedules.

Q. Well, assuming one merchandise car for each of these points that you have named from each of the different origins, I still don't believe you have 150 of them here. You don't completely change the picture every month, do you?

(No answer.)

[fol. 334] By Mr. Baumann:

Q. Mr. Gleaves, these things that you gave: Are those the ones that you consider more or less that have stood over the times, these particular cars?

A. No, sir.

Q. Well, there is some doubt in the Examiner's mind as to why you say that many changes were made.

A. Well, we have over 200 merchandise schedules. I didn't list all of our merchandise schedules by quite a number. We have quite a number destined to nontruck points. We have quite a number destined entirely off the railroad to connecting lines. We have quite a number of peddler cars that we don't term break-bulk cars at all. They are just loaded in station order and handled in a local freight train and peddled out.

Q. Was your answer as to the number of changes based on your total merchandise schedules, the over-all picture?

A. Yes, sir.

By Exam. Croft:

Q. But these that you have named: Those are all of the merchandise cars which carried freight which was later distributed by truck, is that correct?

A. The break-bulk cars that contained freight that will receive subsequent substitute truck handling; yes, sir.

Q. Do you also have break-bulk cars that carry freight which is later distributed in way-freight or peddler cars?

A. Yes.

Q. They are not included in this list?

[fol. 335] A. Well, they are if they are destined to truck territory. Of course, we have cars to, oh, quite a number of places: Quanah, Okla., and Fort Sill and Snyder, Okla., Enid, Okla., Jasper, Ala., Winfield, Ala., Tupelo, Miss.,—

Q. Maybe we could get at what—

A. —Aliceville, Ala. Various other places that are entirely outside of truck territory. We have cars to Chicago, Omaha, San Francisco, Oakland, Seattle, all over the United States, that I wouldn't consider would be involved in this hearing.

By Mr. Baumann:

Q. But it's altogether possible, say, in a car to Oakland, Calif., that there might be some of this joint rail-truck freight in it, isn't it, in that that freight was brought into a certain point and there placed in a through car?

A. Oh, yes. It contains some freight that might have received prior truck handling. But I wouldn't term that a break-bulk car because it doesn't break bulk on the Frisco. It goes somewhere else.

By Exam. Croft:

Q. Well, maybe we can get at it this way. I don't know; I am confused about the picture now. You mentioned a fast merchandise train that you labeled the "Flash" operating out of St. Louis a while ago. How many similar trains do you have operating out of St. Louis?

A. That's the only train that we call a strictly merchandise train. However, they do operate in two sections.

Q. Well, now, what's the operation of that train? Where [fol. 336] do they set out merchandise cars for distribution by truck?

A. At Springfield, Tulsa, Afton, Okla., Oklahoma City, Dallas, Madill, Okla.— No, that train doesn't handle the Madill car. The Madill car is handled on a later train.

Q. That's the only train of that type operating out of St. Louis. How about out of Kansas City?

Mr. Baumann: Pardon me.

By Mr. Baumann:

Q. That later train you talked about, handling the St. Louis-to-Miami car:

A. The Madill car.

Q. Is that a later train of a different type that handles that car?

A. It is a later train, yes. But it handles— It is not schedule— It's not called a merchandise train especially. It's just a fast train.

Q. But does handle cars of this type in it?

A. We handle merchandise cars in that train. We handle merchandise cars, you might say, in nearly all of our through freight trains.

By Exam. Croft:

Q. From what other points do you operate trains similar to the one you have just described?

A. That's the only one.
Q. None from Kansas City?
A. No.

Exam. Croft: Well, I am afraid that line of inquiry [fol. 337] wasn't very fruitful. I don't know exactly where we are getting on this.

Have you any further questions? I sort of took the witness away from you. I didn't mean to.

Mr. Baumann: That's all right. Except this:

By Mr. Baumann:

Q. You made mention of frequent changes in schedules. What controls the establishment, what causes you and your associate officers to determine upon the establishment, of a break-bulk car of the type we are talking about?

A. There are several things to consider. I would say that the first consideration is the amount of tonnage moving. If there is a sufficient volume of tonnage to move then it's economical to put on a car to a certain destination, wherever we can secure sufficient tonnage to operate a car.

Q. Just roughly what do you consider sufficient tonnage, in what amount?

A. Well, at the present time, on account of general order ODT No. 1, we consider 20,000 pounds.

Q. All right. Now proceed.

A. Another consideration is the service, the service that can be given. Now, we may find that when we change a freight train schedule if we get that freight train in later, then it arrives too late to give good early morning service to the merchandise, and we may change the schedule and take that merchandise to some other point and deliver it by truck from that point.

[fol. 338] On the other hand, we may make a freight train earlier where we have been giving truck service. We may put a car on because we can get that car to that point early enough to give early morning service.

Another thing that determines break-bulk cars is your connections. You might start a car out of St. Louis, but, unless there was a connecting train at some junction that would take that car on and you knew it was going to get

down there early the next morning,—well, if there wasn't any train there wouldn't be any use of putting on that car if you could give better service by sending it somewhere else.

Q. And using a truck to destination?

A. Yes.

Mr. Baumann: All right.

By Exam. Croft:

Q. What's the alternative to a merchandise car? A local peddler car or all-motor movement?

A. Well, there are several alternatives, Mr. Examiner. We might take a territory and have one car on to one point and let it fan out by truck from that point. Business may increase, and we may decide to send two cars down to that same territory, only send them to two different points.

Q. You misunderstood me. Assume you haven't enough merchandise to justify a break-bulk car. What do you do with what you have?

A. Oh, well, we would put on a peddler car if the train [fol. 339] service were such as to give good service. Otherwise we would move it by truck if we had trucks operating in that territory.

Q. That's one of the other alternatives?

A. Yes, sir.

Q. I think out of St. Louis the first point you named was Amory in yesterday's cars.

A. I believe it was.

Mr. La Tourette: That's right.

Exam. Croft: I don't locate it immediately.

Mr. Baumann: Here it is.

By Exam. Croft:

Q. Of the points you named served out of St. Louis, what is the closest one to St. Louis? Springfield, Blytheville, Chaffee?

A. Chaffee.

By Mr. La Tourette:

Q. That's Chaffee, Mo., isn't it, Mr. Gleaves?
A. Yes, sir.

By Exam. Croft:

Q. How far is it from St. Louis to Chaffee?
A. 144 miles.
Q. How far is it from St. Louis to Springfield?
A. 239 miles.
Q. Are any of the points you named intermediate, St. Louis to Springfield, or is Springfield the first stop in that direction?
A. Springfield is the first.
[fol. 340] Exam. Croft: Well, I have no further questions just at this moment.

The Witness: May I add something to the same question you asked me?
Exam. Croft: Certainly.
The Witness: Other considerations that cause us to change merchandise cars: For instance, last month the reason for so many changes was the opening of a new freight house at St. Louis. We put on a complete set of schedules out of St. Louis to various points, and by reason of that we made changes in, I would say, two-thirds of the merchandise schedules on the entire railroad. That's the reason for so many changes last month.

By Mr. Baumann:

Q. And that, of course, affected the so-called break-bulk-point cars as well?
A. Materially, yes. We took some off and put some on.
Q. Now, Mr. Gleaves, with particular reference to the Tri-State area, which is the area in southwestern Missouri and Kansas and Oklahoma, in your experience can you give us a little summary of the information as to the changes in break-bulk points that have been made there in the last 4 or 5 years?
A. The Tri-State area is quite a complicated area as far as rail service is concerned. It's a network of branch lines

Quite a number of points are located where we don't have very much through train service.

[fol. 341] By Exam. Croft:

Q. For the sake of the record, tell us exactly what area you have in mind when you refer to the "Tri-State area."

A. The area surrounded by Fort Scott, Kans., on the north; Neodesha, on the west; Afton, Okla., on the south; and Springfield, Mo., on the east.

Q. The territory adjacent to southwestern Missouri, then? Is that it?

Mr. Baumann: It includes a part of southwestern Missouri.

A. Adjacent to the point where Kansas, Oklahoma, and Missouri join.

Exam. Croft: I see.

A. We have attempted any number of cars into this territory. We had cars from various points to Carthage, Mo., Baxter, Ks., Columbus, Ks., Joplin, Mo., Miami, Okla., but none of them were very successful. We never did have what I call a complete break-bulk point in this territory. The only cars we now have operating into this territory are Afton, Okla., and Joplin, Mo., but neither of those points is a complete break-bulk point because you simply can't operate cars into those points from all directions nor out of those points to any direction. There isn't enough volume or tonnage to operate such cars.

By Mr. Baumann:

Q. Now, when you referred to certain cars being operated, say, from St. Louis to Afton, you didn't mean that there was a car in the reverse direction, did you?

[fol. 342] A. There is not.

Mr. Baumann: I want that thoroughly understood. It is not between; it's to in each instance.

By Mr. Baumann:

Q. And why does that situation exist so much on the Frisco?

A. The direction of the volume of the l. c. l. tonnage on the Frisco is generally west-bound. It's much heavier west-bound than it is east-bound. And around St. Louis and Kansas City it is south-bound much heavier than it is north-bound. You might have sufficient tonnage out of St. Louis to run four cars and the inbound tonnage to St. Louis wouldn't be nearly that heavy. You might not have enough tonnage to run any cars. That's true out of Joplin and Afton. There is not enough tonnage even to run one car out of there.

Q. For instance, when you have that situation out of Joplin or Afton, just tell us how you handle merchandise out of that point destined for St. Louis; where you don't have sufficient tonnage to fill a car.

A. Out of Joplin?

Q. Yes. How would you do then?

A. We handle that in substitute service by truck to Springfield, Mo.; there load it in a car for St. Louis, if it's destined St. Louis; load it in a car to Memphis if it's destined in that direction, or to Kansas City, or some place where we make a car that will get it in the right direction.

[fol. 343] Q. I see. Now, a change like that: Would that be made on short notice, or how do you make a change like that in schedule? Assuming you had a car scheduled today, say, Joplin to St. Louis, and you found that this afternoon there wasn't sufficient tonnage accumulated at Joplin for St. Louis. What do you do in order to eliminate that car for the day? Or do you eliminate it right away?

A. Yes. Many times we call on the telephone in the afternoon and tell them to make the change starting at 8 a. m. the following day.

Q. Then if the change is made over, the truck substitution takes place into Springfield, in this instance, and then you have your regular car from Springfield to other points?

A. Yes, sir.

Q. Is that same thing true with regard to some of the

other outlying points? Take, for instance, Blytheville, Ark., or Jonesboro or some of those points, just as an example.

A. Well, the more complicated a change is the better we like to handle it on paper; and if it is some complicated change we try to line it up 2 or 3 days ahead of time so that everybody will have the letter and understand it at the same time. If it is a change in one car, we can call the agent who makes that car and have him put it in effect the next morning.

Q. Now, suppose you made a change in a schedule today because of insufficient tonnage out of a point and, say, in [fol. 344] about 2 days it developed that there was sufficient tonnage, would you reinstall that break-bulk car then, ordinarily?

A. Well, we could do it that way. In fact, we put on a car 3 weeks ago out of St. Louis, and it developed there was not sufficient tonnage for it, and we took it off in about 10 days.

Q. To what point was that?

A. Lebanon, Mo.

Q. Lebanon, Mo. Now, do you run some peddler cars on the Frisco?

A. Yes, we run quite a number.

Q. On what part of the railroad are those generally?

A. Generally in the territory not served by a truck line.

Mr. Baumann: I think for the time being, Mr. Examiner, we will submit the witness for cross-examination. We have endeavored to give a sort of a general picture here.

Exam. Croft: Very well.

Mr. Baumann: And maybe we will have to develop other matters as we go along.

Cross-examination.

By Mr. La Tourette:

Q. Do these cars, Mr. Gleaves, also carry freight which is received on a motor-carrier bill of lading and moving on a motor-carrier waybill at motor rates?

A. The F. T. C. does have a tariff permitting them to substitute rail for truck, and we handle a certain amount of freight for them, yes.

[fol. 345] Q. In these cars that you have been describing as moving out of the various points to the break-bulk points?

A. Sometimes they are handled in our cars, and sometimes they have sufficient volume to load an entire car of their own. It's handled both ways.

Q. But when they have sufficient volume to load a car of their own, it's a movement by the Frisco Railway in substitution for the motor vehicle?

A. Well, it would be that, I believe, in either case, whether it was a separate car or railroad cars.

Q. With respect to the break-bulk points that you mentioned as of today out of St. Louis, Blytheville, Ark., has been a point to which cars were loaded for a number of years, hasn't it?

A. From St. Louis?

Q. Yes.

A. But not from Memphis nor from Jonesboro nor from Chaffee nor from any other points. Blytheville is a sort of a directional affair there. We have loaded cars from St. Louis to Blytheville for a number of years.

Q. I am speaking now of cars moving out of St. Louis.

A. Yes, sir.

Q. The same thing is true of Chaffee, isn't it?

A. That's right. We load cars at St. Louis to Chaffee and have loaded those cars for a number of years. But we don't load them in the reverse direction.

[fol. 346] Q. I understand. I am talking about movements out of St. Louis.

Now, you have loaded cars to Springfield, Mo., for a number of years, haven't you?

A. Yes, sir.

Q. Hayti has likewise been a point to which you have loaded cars out of St. Louis for a number of years?

A. Yes, sir.

Q. And, of course, Memphis likewise?

A. Yes, sir.

Q. Oklahoma City has been a break-bulk point for merchandise cars out of St. Louis for a long period of time?

A. Yes, sir.

Q. Dallas also, has it not?

A. No, sir.

Q. No?

A. The car has been on, I think, since March 18.

Q. Of 1946?

A. Yes, sir.

Q. Weren't you loading cars to Dallas before that?

A. Not from St. Louis.

Q. Not from St. Louis. Joplin has been a break-bulk point out of St. Louis for a number of years, hasn't it?

A. No, sir.

Q. It hasn't?

[fol. 347] A. Oh, it's been off and on. I guess the last time it's been on a year.

Q. Out of Kansas City I take it that for some time you have loaded merchandise cars to Springfield and Memphis?

A. Yes, sir.

Q. And Oklahoma City?

A. Well, the Oklahoma City car I think has been on possibly 2 years. Since business increased. That car is off and on, too.

By Mr. Baumann:

Q. You mean by that it is not steady? The Oklahoma City car is off and on?

A. Well, at the present time our business is heavy enough that we can load a direct car to Oklahoma City. But in the past we had to load it on Tulsa; load it in the Tulsa car, and then have Tulsa transfer it to an Oklahoma City car.

By Mr. La Tourette:

Q. How about Tulsa with respect to a break-bulk point out of Kansas City? How long has that been used as a break-bulk point?

A. That's been in quite a number of years.

Q. Is Joplin a break-bulk point of long standing out of Kansas City?

A. No, sir. We made quite a number of changes over there. As I mentioned, we tried Columbus and Miami and

Afton and Joplin and Carthage. I will say that car has been on for 3 years.

Q. Did you say what the situation was with respect to Tulsa out of Kansas City?

[fol. 348] A. Yes, it's a regular car.

Q. That has been a break-bulk point for some time?

A. Yes, sir.

Q. How about Afton, Okla.?

A. I think that car has been on about 3 months out of Kansas City. Three or four months is all. Since business picked up.

Q. Isn't it true, speaking with respect to merchandise cars out of Memphis, that the following points have been well-established break-bulk points for some time: Chaffee, Hayti, Kansas City, St. Louis, and Springfield?

A. Yes, sir.

Q. Now, with respect to Tulsa as a break-bulk point out of Memphis, has that been of long standing?

A. No, sir. We formerly loaded that in a Springfield car and had Springfield transfer it. But we put that car on possibly a year ago.

Q. How long has the Oklahoma City car been run from Memphis?

A. The same time as the Tulsa.

Q. Amory, Miss.: That has been a break-bulk point of long standing, has it not, for freight out of Memphis to the south?

A. Yes, sir.

Q. Are you familiar; Mr. Gleaves, with the manner in which the charges are assessed to the public on this traffic which moves either by the rail line or the truck line, or is some other witness better qualified to testify with respect to that?

[fol. 349] Mr. Baumann: Mr. Gleaves is a transportation man. I think Mr. English can better answer that question.

By Mr. La Tourette:

Q. Are you familiar with the manner in which the truck operations are presently being conducted with respect to

length of truck hauls on the route marked in red on exhibit A extending from St. Louis to Memphis?

A. Exhibit A?

Mr. Baumann: Exhibit 8-A. I believe Mr. English can better answer all matters relating to trucks. Mr. Gleaves' experience is limited to rail operation and to coordinated l. c. l. service.

Mr. La Tourette: That's all.

By Mr. Reeder:

Q. Mr. Gleaves, in the constant changing of your schedules, do I understand from your testimony that the schedules that you described today in detail in the record are not changed ordinarily; that it's only an occasional car put on and off here and there depending upon the demands of traffic in a particular area?

A. I don't believe I said that, Mr. Reeder. I said they are subject to constant change. They are changed anywhere from— Sometimes they are changed more often than others. But there isn't a single month goes by but what we have quite a number of changes in merchandise schedules.

Q. I should like to inquire of you if the only basis for those changes is the volume of freight to the area adjacent [fol. 350] to a particular destination point that you have selected for a break-bulk car.

Mr. Baumann: Did you mean the volume of freight adjacent to the point or adjacent to and moving to the point? He will have to distinguish. I know from experience he will have to distinguish that, Lee.

Mr. Reeder: I think moving to the point and moving to the territory adjacent to the point. But keep in mind, of course, that I am directing my question to my primary interest in traffic moving by rail and by truck.

A. No, sir; that's not the only consideration. We have the matter of train service. Every change in train service, where there is a merchandise car involved, may require us to change that merchandise schedule. Also, especially during the war, we have had conditions at quite a number of our transfer platforms where we had to do something to re-

lieve that platform and put on cars to bypass that point. I would say that merchandise schedules are very changeable.

By Mr. Reeder:

Q. Now, let's assume that you have a crowded platform and you want to put on a car to bypass that platform. Of course, you will still have cars going to that platform, but you will put on additional cars going on beyond, isn't that correct?

A. That's true.

Q. Now, in changing a schedule I suppose that at least [fol. 351] one of the changes would be that you would change the hours in the day or the day in a week when a particular town was served with a merchandise car?

A. Sometimes. I wouldn't say that has happened so often as to the day in the week unless there is a triweekly involved because we try to give daily service. But quite often the hour of the day is changed, yes.

Q. You do have, however, these numerous break-bulk points which you have served consistently over the years, isn't that true?

A. Well, I would say the ones that we have used consistently over the years are St. Louis, Springfield, Tulsa, Oklahoma City, Dallas, Wichita, Kansas City, and Memphis. We have used those consistently. Then there are a few more that I will say are not quite so consistent.

Q. What are those? Name those.

A. Well, Chaffee was mentioned. The reason I say that is not consistent is because we have used it as a break-bulk south-bound but not north-bound.

Q. I see. You use it consistently, however, as a break-bulk point on south-bound business?

A. South-bound movement but not north-bound because of the lack of volume.

Q. I see. All right. Will you name the others and make similar comments?

A. Well, Afton has been very irregular. It hasn't been [fol. 352] consistent in any direction and at the present time is not a break-bulk point east-bound or north-bound.

Q. Now, what consideration—

A. Hayti: That was mentioned. That's the same as Chaffee. That's been used south-bound but not north-bound or east-bound.

And Amory was mentioned. I guess Amory could be considered a rather consistent break-bulk point.

By Mr. Baumann:

Q. Is that because of its peculiar location with relation to certain lines of railroad perhaps, Mr. Gleaves?

A. Yes. That's a junction point with the Pensacola line.

Mr. Baumann: All right.

By Mr. Reeder:

Q. Some others?

A. No. I think most of the others are rather irregular.

Q. Now, when you say that Afton is rather irregular, tell me, In the last year has it been used more or less steady as a break-bulk point?

A. No, sir.

Q. All right. Now, to what extent has it been used in the past year as a break-bulk point? By that I mean a point to which you send one of these merchandise cars that has truck freight on.

A. We put on a St. Louis-Afton car March 18. Previous to that there was none on from St. Louis. And I can't remember when all these changes took place, Mr. Reeder. [fol. 353] Q. I understand.

A. I am trying to the best of my memory to tell you when it happened.

Q. Yes, I know you are.

A. I am sure about St. Louis. But now on Kansas City it has been, oh, I would say several months ago that we put on a Kansas City-Afton car. We formerly had on a Springfield-Afton car, but we had to take it off. And those are the only cars we have ever operated. We haven't had any outbound cars from Afton in the last 3 or 4 years and possibly longer than that.

Q. Now, with freight from Springfield to Afton that you

formerly operated in a car made up at Springfield, do you now put that in the St. Louis-Afton car?

A. No, sir; we handle that by truck.

Q. All the way to Springfield?

A. Yes.

Q. When freight is shipped from St. Louis to Afton in this car to which you have referred which has been recently put on, does that freight after it arrives at Afton get transferred to a truck?

A. Yes, sir.

Q. And which way does it go from Afton by truck?

A. It goes north, east, and west.

Q. How far north do you send freight out of Afton by truck?

A. I believe that we put the St. Louis freight to Afton—[fol. 354] I know we put the Miami freight in there. I believe that's as far north as we go—Miami.

Q. Now, going east how far does it go?

A. Well, the end of that line is up at Wyandotte.

Q. And to? To Vinita?

A. Up to but not including Tulsa.

Q. You mentioned that you transported the property by rail cars out of St. Louis and these other cities, and that brings to my mind this inquiry: Is it your policy to transport the freight as far as possible by rail and then by truck to destination? Give the railroad the greatest possible number of miles of the haul?

A. Usually that's the practice, Mr. Reeder. There are some things that enter into that, of course. We do that where possible. But, as I mentioned, on our River Division—that's the line along the Mississippi River, including Chaffee and Hayti—we don't have sufficient volume for a north-bound car, and we handle all of that by truck.

But south-bound we do have sufficient volume, and we have cars to Chaffee and Hayti because if we didn't the volume is so heavy we would be running quite a number of trucks down there loaded, and they would have to come back empty. And it is to our advantage in that case to haul it down by rail and transfer it to truck.

Q. I see. Well, now, on the north-bound movement: Do [fol. 355] you have traffic moving north from the territory

around Chaffee and Hayti to St. Louis which moves all the way by truck?

A. Yes, sir.

Q. I suppose some of that is freight that was given to the railroad, that's moving on rail bill of lading?

A. That's all I am talking about, Mr. Reeder. I am with the railroad, and I am testifying only as to rail-billed freight.

Q. I see. O. K. And, obviously, being rail billing it is moving at rail rates?

A. Yes, sir.

By Mr. Damon:

Q. I just wanted to inject that the tonnage going north out of that particular territory is very light?

A. Yes.

By Mr. Reeder:

Q. I am wondering about the movement of a car from Fort Worth to Madill, Okla. I would like to have you explain to me why it is that you transport freight from Fort Worth to Madill by car and thence to destination by truck when you have a truck line moving from Dallas to Madill. And I am particularly wondering if your answer would be, as you said a minute ago, to give the rail all the possible haul.

A. No, I don't believe that's so. We don't have a truck line out of Fort Worth.

Q. You have one out of Dallas, however, which is much closer than Madill; isn't that true?

A. Well, now, our line from Sherman to Irving— When [fol. 356] it gets to Irving it splits, and one segment goes to Fort Worth and one to Dallas. Our freight-train service is between Fort Worth and Sherman and between Dallas and Sherman, and inasmuch as our trains operate that way it's much better for us to take that car on up to Madill, where we have a truck operation in several directions out of there, than it would be to take it to Dallas and haul it by truck up there. As long as you are going to have to transfer from rail to truck, we do try to take it just as far as we can, Mr. Reeder.

Q. By rail?

A. Yes, sir.

Q. Now, freight that's transported from Fort Worth and Dallas to Madill by rail and thence from Madill by truck would be moving which way on your truck line?

A. Well, we don't have a car out of Dallas, Mr. Reeder. We handle that by truck out of Dallas. But out of Fort Worth we don't have a truck line so we handle that by car. But after it gets to Madill from Fort Worth by rail, that car contains freight that will receive subsequent truck movement for Ardmore—now, that's on the west—Durant on the east, and then north up as far as Okmulgee.

Q. Now, does that same truck take the freight off the car that stops at Ada out of St. Louis and Kansas City?

A. Well, we don't have a car to Ada from St. Louis and Kansas City. We have one from Tulsa.

[fol. 357] Q. From Tulsa only?

A. Yes, sir.

Q. Well, now, does that truck take freight from that car that's from Tulsa to Ada?

A. Well, the south-bound truck does.

Mr. Baumann: When you say the "same truck," you don't mean the same in the sense of being the same vehicle as it moves along on a certain schedule, do you?

Mr. Reeder: I wanted to find out about that, too, but I hadn't got to that particular question.

By Mr. Reeder:

Q. What about that, Mr. Gleaves? Would there be some truck that would take freight at Ada on its route north to Okmulgee and peddle to those towns between Ada and Okmulgee?

Q. Not that moved by rail, Mr. Reeder. Any freight that originated at Ada would move on that same truck, yes.

Q. Then that truck, or whatever truck that happened to be moving through there, however, would take freight that had come to Ada out of Tulsa and would move it south-bound. Is that what you said?

A. Yes. Our direction of volume in that territory is

south-bound, and, in order to conserve trucks, we run a Tulsa-Ada car. But north-bound it all moves through there by truck.

Q. It seems from your testimony that your cars are all moving south or west. Don't your cars have to go back to those cities from which they originate?

[fol. 358] A. Not in l. c. l. service; no, sir. We use them for carloading; use them in grain territory in the grain season perhaps if they are suitable, or for other carloading in carloading business.

Q. Now, do those cars move loaded entirely in their movement back to the centers from which they originated?

A. Well, that depends upon where your loading is and where your empties are. That's quite a changeable proposition. That changes from week to week.

Q. It is a fact, however, isn't it, that you have empty cars moving back to Tulsa from the south, back to Springfield from the south and from the west, and back to Kansas City from the south, west, and east, and so on?

A. I suppose you could find empties moving in both directions on any part of the railroad, to some extent.

Q. Well, but I think you are not quite answering my question. I think you know what I mean. You do, as a matter of fact, have empties moving back to these origin points consistently and regularly, don't you?

A. Well, at the present time I can't answer what the direction of empty movement is on that line. I am unable to answer you.

Q. On the Frisco Railroad.

A. As of today I can't answer that.

Q. Well, just tell me generally, over the period of the years that you have been in rail traffic service, isn't it a fact [fol. 359] that you have empty cars moving back against the flow of traffic toward Springfield, Kansas City, St. Louis, and Memphis?

A. I guess you are talking about boxcars now?

Q. Oh, yes. Railroad freight cars.

A. Boxcars?

Q. Yes, boxcars. Like the ones that move out with the flow of traffic handling l. c. l.

A. Well, sometimes we have empties moving in one direction; sometimes we have them moving in the other direction.

Q. Don't you know what I am asking you, Mr. Witness?

A. Well, I can't answer that. I can't say that the direction of empty volume or the volume of the empty movement is always in that direction, no; I can't answer that. Sometimes it is and sometimes it isn't.

Q. There are always some cars moving that way empty, though, aren't there?

A. As I said a while ago, you can look in a lot of freight trains, and you will find one north-bound freight train and one south-bound freight train, and they have both got empties in them. Yes, that's true.

Q. Now, do you mean to tell us that you never transport l. c. l. merchandise in cars that are part of trains moving from, we will say, Ada, Okla.? Not made up there, now, but just moving in the direction of St. Louis?

A. That we never transport loaded l. c. l. cars out of Ada? [fol. 360] Q. Not loaded cars. Just cars having in them l. c. l. merchandise.

A. Oh, yes. We have cars out of Dallas, if that's what you mean, or Madill; or once in a while Ada will make an extra car, fill it full of merchandise. It might be something that couldn't be handled in a truck. I was down there last month, and they had a bunch of steel ties about 12 feet in diameter that they loaded in a car. But we don't have a merchandise schedule by rail out of Ada.

Q. I understand. But you do have merchandise l. c. l. that's moving back in rail cars towards Tulsa, Springfield, Kansas City, and St. Louis?

A. Yes, sir.

Q. And from the southeast, moving back toward Memphis and Blytheville and Chaffee and St. Louis and so on. Now, I don't mean destined to those points necessarily but moving in a northerly direction.

A. Well, moving through there in through freight trains, yes; we have merchandise cars.

Q. Do you make up a merchandise car at Tulsa, Okla., destined to Ada?

A. Yes, sir.

Q. Now, where does the freight originate that goes into that car?

A. Oh, some of it originates at Tulsa, some of it per- [fol. 361] haps comes from connecting lines at Tulsa. Some of it comes in there from the Los Angeles car, and some of it comes from the Chicago car, and some comes from the St. Louis car, the Springfield car, the Kansas City car, the Enid car, the Oklahoma City car.

Q. I see. Now, that car is transported down to Ada, and the freight from that car is put on a truck, as I understand it?

A. Well, some of it is. I would say the majority of it is destined Ada.

Q. To Ada proper?

A. Ada proper and connecting lines. But it also contains freight for those small towns south of Ada.

Q. Does it contain freight for the small towns north of Ada, between Ada and Okmulgee?

A. No, sir. We have to back haul it to do that.

Q. Would you peddle right out of the Ada car to Beggs, Okmulgee, Henryetta, Wetumka, and Hornes Corner?

A. No, sir.

Q. How would the l. c. l. freight that's going to those towns be handled by rail-and-truck combination?

A. It would be turned over to the trucks at Tulsa for handling in substitute service direct to destination if it is moving from the north.

Q. I see. And if it was moving from the south I take it that it would be transported in the rail car to Madill and [fol. 362] there put on the truck?

A. Yes, sir.

Q. And that truck, I believe you testified, would carry freight to points as far north as Okmulgee?

A. Out of Dallas, I believe I stated a while ago. Of course, they are liable to pick up freight at some of those points and take it on into Tulsa.

Q. I see. Does that truck go into Tulsa?

A. Yes, sir.

Q. But it wouldn't carry Dallas freight into Tulsa?

A. No, because we have a Dallas-Tulsa car.

Q. Now, will you tell us about the operation between Memphis and Amory? That's Memphis, Tenn., and Amory,

Miss. Do you have a car which is made up at Memphis of freight originating at various points on your system and on other rail systems with freight destined to Amory and points beyond?

A. Yes, sir.

Q. Now, does that car contain freight destined to points between Memphis and Amory?

A. No, sir; it doesn't.

Q. How is the freight transported destined to points on the Frisco Railway between Memphis and Amory?

A. Well, it was formerly handled entirely by truck out of Memphis in substitute service. It got so heavy for Tupelo we had to put on a Memphis-Tupelo car a short time ago. [fol. 363] But that's not a break-bulk car. It only contains freight for Tupelo proper and connecting lines. It strictly unloads at Tupelo. It doesn't transfer anywhere else; it contains only Tupelo freight.

Q. Now, tell us, how about Holly Springs and New Albany and Nettleton?

A. Those points are handled by truck out of Memphis.

Q. All the way?

A. Yes, sir.

Q. All right. Now, I take it there is a truck stationed at Amory which transports the freight out of this car from Amory to the towns on the truck routes south of Amory?

A. Yes. Columbus and those points are handled by truck out of Amory.

Q. Have you ever seen that truck yourself?

A. Well, I have seen quite a number of trailers. You say "that truck." They have got quite a number of tractors and trailers down at Amory.

Q. Oh, they have?

A. Yes, I have seen them.

Q. Now, what about freight that's moving north? Is that delivered to the trucks at Amory out of Pensacola, we will say, or some of these Florida points or out of Birmingham?

A. I'm sorry; I missed that question.

Mr. Reeder: Will you read it?

[fol. 364] (Question read.)

A. To what destination?

By Mr. Reeder:

Q. Well, suppose you tell me: Is any of it handled by truck from Amory, having originated on the rail line?

A. Oh, yes. We have a Birmingham-Amory car, and if that car has a shipment in it for Columbus it's taken out of the car at Amory and handled in the truck to Columbus.

Q. Now, what if it has a shipment in it for Tupelo?

A. In the same manner. It's transferred to the truck at Amory.

Q. Is the same thing true for Holly Springs?

A. Yes.

Q. What about Memphis?

A. We have no schedule for Memphis.

Q. That would go by rail to Memphis?

A. Yes.

Q. What if it was destined to a point beyond Memphis? Let's say Marked Tree, Ark.

A. That would go in the Memphis car and transfer to the truck at Memphis.

Q. Then actually the trucks out of Amory would peddle as far south as Columbus and as far north as the point of Holly Springs, and that's all?

A. No. There's quite a number of towns not shown on this map between Memphis and Holly Springs.

[fol. 365] Q. Oh, I see.

A. They would peddle all the way from both directions between Memphis and Columbus.

Q. But they wouldn't transport—

A. They would receive additional freight at Amory.

Q. If freight originated at Amory, however, it would be transported by car to Memphis, wouldn't it?

A. If it was destined Memphis and beyond, it would, yes.

Q. Now, suppose the freight originated at Columbus or Kolola Springs or Aberdeen, destined to Memphis or beyond. Would the truck line transport that to Amory and the railroad from Amory to Memphis and beyond?

A. No. Freight from Columbus or Memphis— This truck from Columbus— Either the trailer goes on through or it makes a direct connection at Amory. I can't answer that. But we substitute all the way in that case, Columbus to Memphis.

Q. There isn't any reason why you couldn't put that in that car at Amory, though, if you make one up there?

A. None except it might cause an additional transfer, is all.

Q. Now, as between Kansas City, Mo., and Springfield, Mo., do you have a car that operates between Kansas City and Springfield, a local merchandise car? No, I don't mean a local merchandise car. I mean a merchandise car.

A. Yes, sir.

Q. And that contains freight which is going to move by [fol. 366] truck after it gets to Springfield?

A. Yes, sir.

Q. Now, for what points would the truck freight on that car be destined if it is going to move by truck from Springfield?

A. Oh, to towns between Springfield and Crocker, Mo., to towns between Springfield and Monett, and between Springfield and Clinton.

Q. And that's all?

A. Well, Ozark. There might be one or two others in there, but substantially that's all, yes.

Q. You will back-haul some of that freight, then, out of Springfield by truck, won't you?

A. No, sir. I don't believe that's back-hauling it. Well, as far as Clinton. Well, that's a different line up to Clinton. We don't put the Clinton freight in there, but we do handle— Well, now, I am wrong out of Kansas City. We handle that freight to Bolivar and those places by truck all the way. From other directions, why, we transfer it as Springfield in a north-bound truck.

Q. Well, freight moving from Kansas City, Kans., to Clinton, Mo.: Would that move by car to Clinton or by truck to Clinton?

A. It would move by— Well, we made a change in that. We formerly handled that in a car, and that's now being changed to truck movement, except on Saturdays we handle it in cars.

Q. While we are on that subject, why was the change [fol. 367] made, and when was it made?

A. We decided on that last week. It's because we have got a through train and a local train down there, and the

coal movement out of Clinton north-bound has fallen off to the point where we can "get by" with one train. And the south-bound train: They wanted to annul it part of the time during the week, and we started handling it by truck.

Q. So that situation is temporary, then, because of the coal strike?

A. No, it's not caused so much from the coal strike as I think the warmer weather possibly or a change in the sales of their Clinton coal. The Clinton mines didn't go out on strike. I think most of that coal is going to move south-bound now, which reduces the train service north of Clinton.

Q. Now, that truck will handle freight that's been offered both to the railroad and to the truck line, won't it, then? L. C. L. freight.

A. Well, to the best of my knowledge, it does. Of course, I don't know what the Frisco Transportation Company does with their own freight. I believe they handle it in the same truck, yes.

Q. They will handle your freight, though, as I understand it?

A. Yes.

Q. To Clinton and Deepwater and Osceola and these other towns en route to Springfield?

[fol. 368] A. Yes.

Q. Now, you mentioned that the limits of the transportation of freight out of the car we were talking about to Springfield were Crocker, Monett, and Clinton, and we have discussed Clinton. Now, as to Crocker, that freight will be peddled by truck from Springfield as far as Crocker?

A. Yes, sir.

Q. Now, what about a shipment destined to Dixon, the next point beyond Crocker? Will that be transported by car to Crocker and then by truck beyond?

A. Well, we have one car out of Kansas City to Springfield that has freight in it for Springfield to Crocker. The F. T. C. has an early morning truck out of Springfield, and it only goes as far as Crocker. Then in another car for Springfield we have in there freight for points the other side of Crocker and up to Pacific, Mo., and that is turned over to

the truck line at Springfield later on in the day and goes out that way.

Q. Now, what about traffic for points between Pacific and St. Louis out of Kansas City? How is that handled?

A. We send that to St. Louis for handling by truck out of St. Louis.

Q. And send it back by truck?

A. Yes.

Q. Now, do you have any cars that go to Crocker with freight in them for points between Crocker and Pacific which [fol. 369] is handled from Crocker to destination by truck?

A. No, sir. We have a perishable schedule that peddles all the way from Springfield to Newburg. I believe it's twice a week. That's in a refrigerator car. And that goes through Crocker, but it doesn't make empty at Crocker; it goes on through.

By Mr. Baumann:

Q. By "perishable schedule" do you mean packing-house products?

A. Yes, requiring refrigeration. Packing-house products and meat and so forth.

By Mr. Reeder:

Q. Now, tell us about Monett. Traffic moving beyond Monett moves how out of Kansas City?

A. Which direction, Mr. Reeder?

Q. Well, this traffic is moving from Kansas City beyond Monett in the direction of Fort Smith.

A. At the present time that moves by rail to Joplin, handled by the F. T. C. into Monett; and for points between Monett and Seligman it's handled by I believe it's the Smith Truck Line. I am not positive about that.

Q. But an independent motor carrier, in any event?

A. Yes.

By Mr. Baumann:

Q. Is that handled under substitute service?

A. Yes, sir; substitute service.

Q. For your railroad?

[fol. 370] A. Yes, sir.

By Mr. Reeder:

Q. Now, for points between Seligman and Fort Smith, how is that handled out of Joplin? I assume that goes by car to Joplin. Does it go beyond Joplin by car?

A. Offhand I can't remember whether it goes to Joplin or Springfield, but I am inclined to think it goes to Springfield in a car and thence by truck.

Q. Thence by truck all the way to Fort Smith, peddling the whole way?

A. Yes, sir.

Q. That would go through Monett, then, and through Cassville and through Seligman?

A. Yes, sir.

Q. Now, traffic that's moving out of Kansas City to points between Springfield and Joplin is transported how?

A. From Kansas City to points between Springfield and Joplin?

Q. Yes, sir.

A. Well, west of Monett it goes through Joplin, and east of Monett it goes through Springfield.

Q. It would go to either Joplin or Springfield by car and thence to destination by truck?

A. Yes, sir.

Q. Now, traffic moving west of Joplin moves in what manner?

A. From Kansas City?

Q. Yes.

[fol. 371] A. Moves to Joplin in a car and thence by truck to destination.

Q. Would it go by truck, for instance, all the way to Wichita?

A. Yes, sir. Up to Wichita; not including.

Q. If it was destined Wichita you would move it by car?

A. Move it by car to Springfield and transfer it into another car there at Springfield for Wichita.

Q. I see. Freight destined for points between Oklahoma

City and Tulsa: Is that transported by car to Oklahoma City and peddled back by truck?

A. From Kansas City?

Q. Yes.

A. No, sir. It's handled by car to Tulsa and peddled west-bound.

Q. All the way to Oklahoma City?

A. Well, I am not sure about that. I think there are one or two points down there that are handled out of Oklahoma City.

Q. Now, that's by truck when you say "peddled west-bound"?

A. Yes, sir.

Q. Now, freight destined to points between Tulsa and Afton, Okla.: Is that transported by car to Afton and thence by truck?

A. From Kansas City?

Q. Yes, sir.

A. Yes, sir.

Q. Now, if the freight were destined to Tulsa, however, [fol. 372] it would go all the way by car, wouldn't it, out of Kansas City?

A. That is correct.

Q. Now, traffic moving out of Kansas City to points on the rail line between Springfield and Memphis: How is that transported?

A. Kansas City makes a peddler car that peddles between Springfield and West Plains. And then these towns —Hardy, Black Rock— If I remember right, merchandise for those towns in there, Hardy and Black Rock, is sent to Springfield and given to the F. T. C. at that point and handled in substitute service. And freight between Black Rock or Imboden—I forget at which of those towns we split it—down to Memphis is handled by rail from Kansas City to Memphis and then handled by truck.

Q. Back?

A. Back, yes.

Q. So that Black Rock or Imboden, one of the two, is your dividing point?

A. Yes, sir.

Q. Now, Imboden is a point I don't see on this map, exhibit 8-A.

A. Well, it's right close to Black Rock.

Q. Is it immediately south or immediately north of Black Rock?

A. The first station north.

Q. So that I can mark it on my map, can you tell me how many miles north of Black Rock it is on the rail line?

[fol. 373] A. Nine miles.

Q. About half way between Hardy and Black Rock, then, isn't it?

A. No, not quite that. It's 22 miles from Hardy to Imboden.

Q. Oh, I see.

A. And 9 miles, Imboden to Black Rock.

Q. That's spelled I-m-b-o-d-e-n?

A. Yes, sir.

Q. Now, after referring to your map that you have been looking at, can you tell us if Imboden or Black Rock is the dividing point?

A. I can't answer that. I don't recall just what the merchandise schedule says on that.

Q. Do you have yards at West Plains?

A. No, sir.

Q. Do you have any switching track there? I mean substantial switching tracks.

A. We have no switching engines at West Plains.

Q. What about at Jonesboro?

A. We have an industrial switch engine, but we don't have any yards, any train yards, to speak of.

Q. Now, traffic going out of Kansas City, still, and moving beyond Springfield on your line in the general direction of Memphis, but on this spur track east of Willow Springs, how is that transported?

Mr. Baumann: Tell him how long that spur track is first.

[fol. 374] Mr. Reeder: Oh, well, I didn't mean to call it a "spur track." I just wanted to know where I was at.

Mr. Baumann: The map is very deceptive, and we are going to call attention to the fact very shortly.

A. Car to Springfield and thence by truck.

By Mr. Reeder:

Q. How far is it from Willow Springs to Van Buren and Chicopee?

A. It's 61.6 miles to Chicopee; 61.1 miles to Van Buren.

Q. Now, what about traffic that originates in the towns located on the railroad between Springfield and Memphis destined to Kansas City? How is that handled?

A. That's picked up by truck and handled into Memphis or Springfield and thence by rail.

Q. Mr. Gleaves, I observe a route between Fayetteville, Ark., and Fort Gibson, Okla., as to which there is no rail line shown. It is my recollection that the rail line has been abandoned in there and taken up. Is that correct?

A. That is correct.

Mr. Baumann: I mention in that connection that that service was instituted at the time or about the time the rail line was abandoned, and I think the purchase was made from Powell Brothers. Was it not, Mr. English?

Mr. English: Yes.

Mr. Reeder: Yes, that's why he bought it.

By Mr. Reeder:

Q. Now, assuming a shipment originating at Kansas [fol. 375] City moving to Sikeston, Mo., how would that be transported?

A. I believe that would be transported to Memphis by rail and transferred to another rail car to Chaffee and thence by truck to Sikeston.

Q. Now, if the shipment was to Jackson, which is north of Chaffee, would it be transported the same way?

A. I don't recall Jackson.

Mr. Baumann: Jackson, Mo., is not a rail point.

Mr. Reeder: Oh, thank you. Cape Girardeau instead of Jackson.

A. That would be handled by rail to Springfield, thence rail to St. Louis, thence truck to Cape Girardeau.

By Mr. Reeder:

Q. Now, if the shipment was destined to Chaffee, would that be transported by rail all the way?

A. Yes, sir.

Q. And I take it that if it was for a point between Chaffee and Memphis, out of Kansas City still, it would be transported by rail to Memphis and then by truck to destination, or is there some point between Chaffee and Memphis beyond which trucks don't go?

A. Well, the trucks go to all, or practically all, of those points, but it wouldn't always be handled by truck all the way. Some points could be handled by truck from Memphis to destination.

[fol. 376] Q. What would those points be?

A. Well, all those points between Memphis and Blytheville and over to Lake City would go by truck all the way.

Q. That is, all the way out of Memphis?

A. Yes, all the way out of Memphis. Caruthersville, for example, would move by rail to Hayti and thence by truck to Caruthersville.

Q. Now, what about Portageville, which is just north of Hayti?

A. That would go in the Hayti car out of Memphis.

Q. And thence by truck to Portageville from Hayti?

A. Yes, sir.

Q. Now, if the shipment were destined to this point—it looks like Canalou; it appears to be a rail point adjacent to U. S. Highway 61 just north of New Madrid—would that be transported by rail to Chaffee and thence by truck to destination, or would it be transported by rail to Hayti and thence by truck to destination?

A. That would go in the Memphis-Hayti car.

Q. What are the limits, the distance limits, from Chaffee of the points, freight for which would be loaded in the Chaffee car? I am thinking of freight out of Kansas City and St. Louis, either one. Or moving through St. Louis.

A. It's not a matter of distance, Mr. Reeder. As you will notice from the map, the River Division is cut up into a lot of branch lines and a lot of territory.

[fol. 377] Q. Yes, I see that.

A. Now, the F. T. C. operates certain trucks out of Chaffee that covers a part of this territory. They operate certain trucks out of Hayti that covers a part of this territory. And if the town is on the truck line from

Chaffee we send the merchandise to Chaffee. If it's on the truck run out of Hayti we send it to Hayti. It is not a matter of distance. It's a matter of which truck line serves the town.

Q. I see. The trucks are based at Chaffee or Hayti?

A. Yes, sir.

Q. Are there any other points on the railroad between St. Louis and Memphis at which you have trucks based and at which you set out merchandise cars?

A. No, sir; except we have a St. Louis-Blytheville car because of the preponderance of south-bound tonnage to that territory.

Q. Oh, yes. And traffic moving for what points would be set out at Blytheville for delivery by truck to destination?

A. Well, from St. Louis to Blytheville that car would contain all the territory south of Blytheville, Blytheville proper, and Blytheville to Jonesboro. But out of Memphis it would move truck all the way.

Q. I see. How would a shipment that was going through St. Louis to St. Marys, Mo., be transported?

A. By rail.

Q. All the way?

[fol. 378] A. Yes, sir.

Mr. Baumann: We have no operating rights into St. Marys, for the information of counsel, as a trucking company.

Mr. Reeder: Mr. Baumann, does the Truck Line have any points on the route between St. Louis and Jackson, St. Louis and Cape Girardeau?

Mr. Baumann: Presently there are no points. Cape Girardeau is the first point we serve out of St. Louis under temporary authority.

Mr. Reeder: I see.

Exam. Croft: Well, what is the black line down there?

Mr. Baumann: To the best of my recollection, that is the Sub 15 route which was mentioned yesterday, the certificate in which has been canceled—the black line. We will check that, however, and verify it in this amended map we spoke of off the record.

Exam. Croft: Very well.

Mr. Reeder: Well, is that also true of this black route over here just west of the route shown in brown? I am talking about exhibit 8-A, Mr. Baumann, marked State Highway 51, State Highway 34, State Highway 91, and so on. The towns of Puxico, Advance, and so on.

The Witness: No, sir. Those are served irregularly.

Mr. Reeder: Those are served irregularly.

Exam. Croft: Mr. Reeder, in that connection, I have dis-
[fol. 379] cussed with Mr. Baumann the desirability of putting in an amended map which will eliminate those irregular routes and will correct some other defects. It will also be a larger map, possibly a sectional map.

Mr. Reeder: That would certainly be helpful.

Exam. Croft: He has agreed to do that. We will probably discuss it a little further later on.

Mr. Reeder: All right.

By Mr. Reeder:

Q. Will you tell us the points between Springfield and St. Louis at which you set out merchandise cars, out of which freight is to be taken by the trucks and delivered to destination?

A. We don't have any.

Q. Are there any such points between Kansas City and Springfield?

A. No, sir.

Q. Between Wichita—

A. Well, now, pardon me.

Q. All right.

A. Let me— Yes, that answer is right.

Q. All right. Between Wichita and Springfield?

A. None.

Q. Between Springfield and Memphis? I think you earlier mentioned Imboden and Black Rock.

A. No. There is no car through Imboden or Black Rock at all.

[fol. 380] Q. That just happens to be a dividing line point?

A. That's the dividing point between the freight we handle out of Springfield by truck and out of Memphis by truck.

Q. Yes, I see. Are there any points between Springfield and Memphis at which you set out a car containing freight which will be transported to destination by truck?

A. Well, we have an occasional car to Jonesboro that contains mostly Jonesboro freight. And when that car is operated we also load in it, in order to fill it up, any freight for the territory in that vicinity. And that's turned over to the truck at Jonesboro.

Q. I see.

A. That car doesn't operate daily, however, because of lack of tonnage. If there is enough tonnage we run it, and if there isn't we don't.

Q. Now, in naming Chaffee, Hayti, and Blytheville, have you named all the points on your route between St. Louis and Memphis at which you set out cars containing freight which will be transported to destination by truck or which has been transported part way by truck?

A. Yes, sir.

Q. What about between St. Louis and Jonesboro? Are there any points at which you set out such cars?

A. St. Louis and Jonesboro?

Q. Yes. I mentioned Jonesboro. Let me change that to [fol. 381] Walnut Ridge, if you please.

A. Well, we have a car out of St. Louis that peddles on the local train from Cape Girardeau to Hoxie, Ark.

Q. You don't have any truck service, then, paralleling that rail route, do you?

A. Yes, sir; from Hoxie to Datto.

Q. But you use a rail car between Hoxie and Datto for peddling?

A. In one direction from— Let me change that. From St. Louis the merchandise for that line, Datto to Hoxie, is loaded in that same car, and inasmuch as that car is going through those towns we don't pick it out and turn it over to the trucks. We just leave it in the car and let it peddle down the line. But out of Memphis merchandise for Walnut Ridge and those places is handled by truck out of Memphis.

Q. All the way. Is that right?

A. Yes, sir.

Q. Now, between Cape Girardeau and Advance is the

traffic handled in this peddler car, this way-freight car, you mentioned?

A. Yes, sir.

Mr. Reeder: I believe that's all. Thank you very much.

Exam. Croft: Mr. Earnshaw?.

By Mr. Earnshaw:

Q. As a part of the whole picture you have mentioned peddler cars. Can you give us a rough approximation of how the total number of peddler cars compares with the daily number of these "break-bulk cars," as you characterize them?

[fol. 382] A. You mean on our entire railroad?

Q. Yes.

A. Or just in this territory we are talking about?

Q. Well, for the same territory you have been talking about in connection with the break-bulk cars.

A. Well, it would be a very small percentage of peddler cars because where we have truck rights we generally do our peddling and picking up by truck. It's more practical that way, and it gives better service.

Q. Does your company have a symbol book which it distributes to the public which shows symbol trains?

A. No.

Mr. Baumann: What do you mean by "symbol trains"?

By Mr. Earnshaw:

Q. Are your scheduled freight trains given symbol numbers?

A. We don't use that system. We give them train numbers and names.

Q. Well, do you distribute those schedules to the public?

A. Well, formerly some of those schedules were printed in the passenger folder, but that was taken out, and I am not sure whether they have been put back in or not. I will have to look.

By Mr. Bauman:

Q. You are now looking at exhibit 9-A, aren't you, Mr. Gleaves?

A. Yes.

[fol. 383] No, sir; we don't.

By Mr. Earnshaw:

Q. And may we assume also that there is no published list of merchandise schedules distributed to the public?

A. That's right.

By Mr. Baumann:

Q. Well, Mr. Gleaves, if the traffic department as such distributed a list or advertisement in connection with merchandise schedules, that wouldn't be under your jurisdiction, anyway, would it?

A. Well, yes, it would because they would consult us to find out what they were. Now, they did issue such a book before the war, but it's been out of date for some time and has not so far been reissued.

By Mr. Earnshaw:

Q. Do you know whether or not there is any contemplation of resuming such a publication?

A. We have done some talking about it.

Q. In connection with your discussion of the break-bulk cars locally on the Frisco Railway, you have made passing references to cars from off-line points, such as Chicago and so on. Now, are there cars of that type which break bulk on your road which you have not mentioned?

A. Yes.

Q. As to which the freight either originated or was destined as a truck movement?

A. Yes, sir.

[fol. 384] Q. And there is a substantial number of those cars, as I understand it?

A. Yes; there is an average of 20 or more per day through St. Louis, several per day through Kansas City, and some through Birmingham and Memphis.

Q. You said several per day through Kansas City?

A. Yes, sir.

Q. You couldn't be more specific than that?

A. No, I couldn't.

Q. And those cars might, or would ordinarily, take freight right from trucks?

A. Sir?

Q. Those cars might load freight directly from the trucks?

A. Well, they load on some other railroad. I can't answer that.

Q. Well, then, unload. You are talking about both directions, aren't you? Coming and going?

A. No. I am just talking about the cars loaded on other railroads that we receive.

Q. I see. And they would unload directly with the trucks?

A. If there is freight in those cars that the schedule provides for truck movement, it would, yes.

Q. Are those break-bulk points used by those cars generally the same as the break-bulk points which you have described to us for your local cars?

[fol. 385] A. No, sir. Those cars from connecting lines are unloaded at St. Louis, Kansas City, Springfield, Memphis, Birmingham, and Tulsa.

Q. They are included within the points that you have discussed but they include all of them?

A. That's right.

Q. Now, what about the other direction or freight originating on the Frisco going off line?

A. We load cars to— You want them named?

Q. If there aren't too many.

A. Springfield to Oakland, Calif., Springfield to Los Angeles, Calif., Springfield to Amarillo, Tex., Springfield to Houston, Tex., Springfield to Omaha, Nebr., Springfield to Denver, Colo., Springfield to Chicago, Ill., Springfield to four or five different freight houses at East St. Louis, Ill., Springfield to Cincinnati, Springfield to Columbus, Ga., Springfield to Atlanta, Ga., Memphis to Jacksonville, Fla., Memphis to Atlanta, Ga., Memphis to Columbus, Ga., Memphis to Little Rock, Ark., Memphis to Pine Bluff, Ark., Birmingham to Columbus, Ga., Birmingham to Atlanta, Ga., St. Louis to Little Rock, Ark. And there might be some more. Those are ones I recall offhand.

By Mr. Earnshaw:

Q. Do you have the figure in mind as to the number of cars, break-bulk cars, handled by the Frisco on a typical day of merchandise traffic?

A. All I have is the total cars, the total cars operated. [fol. 386] That includes all cars loaded by the Frisco, whether they are break-bulk cars or peddler cars or trap cars or overhead cars. In February we operated 6,799 cars.

Q. You have no break-down of that by interline or other subdivisions?

A. No.

Q. Do you keep a record of the volume of traffic handled by the different truck lines, by the different segments of the Frisco Transportation Company, in the rail-saving operation?

A. That's all handled by the accounting department. I don't have any figures on that.

Pardon me. Maybe I didn't understand the question. Will you read that question?

(Question read.)

I don't have any.

By Mr. Earnshaw:

Q. Do you have any substantial congestion in your freight houses or on your transfer platforms at the present time?

A. At the present time, no.

Q. I don't think the record is clear on one quite important thing, Mr. Witness. When at a particular station, break-bulk point, there is a certain amount of freight ready for movement, and there is the truck operation or the rail car, who is the one who makes the decision whether that shall move by truck or by rail?

[fol. 387] A. Merchandise schedules are put out over the name of A. M. Ball, Superintendent of Transportation, Frisco Railway. Now, if on some one day there should be an accumulation, the local agent could run a car to territory ordinarily served by truck because he had a suffi-

cient volume of tonnage on that particular day to run such a car.

For example, at Springfield they might run 200 cars during the month to possibly 100 different destinations that are ordinarily served by truck on account of the volume of business and trucks not available; or if he has 20,000 pounds for one destination he simply loads it in a car.

That is up to the local agent on a temporary proposition. But on a permanent proposition, when it comes to changing a merchandise schedule, that is handled by my department.

Q. Now, as I understand it, in your department you use as criteria as between using truck and using rail the volume of traffic?

A. That and service to the public and available train service and whether or not we can save a transfer. And several other items enter into those schedules.

Q. Do you use the empty car situation as one consideration?

A. No, sir.

Q. Say there is a favorable traffic balance, a balance of empty cars on a particular segment, would you use that as a consideration, amongst others?

[fol. 388] A. At the present time we have general order ODT No. 1. We have used that at times in our application to them for a permit to operate a light car. But at the present time we couldn't put on a light merchandise car even if we had the empties available unless we went to the ODT for authority.

Q. Do you also use the loading conditions on the trucks as they come to your attention? That is, if the trucks are handling a great deal of other freight so that it would be necessary to put on additional trucks to handle your traffic. Do you use that as a consideration?

A. Yes, very much so, if the volume is in one direction. Mr. English and his department quite often call to my attention the fact that they are running light trucks in one direction and ask if we can't run more cars in the direction of the heavy volume. And we work together on that proposition.

Q. Now, do you use a cost comparison? That is, in a

general way. Do you ever consider simply the fact that it will cost less to use one method or the other in a particular situation?

A. That enters into it to some extent, yes.

Q. And would that take into consideration other elements, additional elements than volume and transfer which you have already mentioned?

A. Yes, it would. Service to the public—

Q. No. Confine this answer to cost.

A. To cost?

[fol. 389] Q. Yes.

A. I say we give service to the public consideration above the cost proposition.

Q. But are there other elements of saving by one method or the other than volume of traffic or the possible saving of transfer which would enter into your determination that it would be cheaper to use one method or the other?

A. You mean, do we use— I don't quite understand your question.

Q. Well, I think you have just about covered it. You say that you do take into consideration the cost in making the decision of which method should be used. And I pointed out that you have already mentioned loading, heavy loading and saving of transfers, as cost elements which you would consider.

A. Yes.

Q. Are there any other cost elements of that type which you think of which you would also consider for using either the truck or the rail in a particular situation?

A. Yes, we take that into consideration. If we have a train going to a certain point anyway and we have got enough volume for a car, we might just as well put it in a car and send it down there rather than operate trucks at an additional cost.

Q. In other words, there are also considerations of carrier convenience, aren't there? If you happen to have a loading gang handy to handle a car or not and things of [fol. 390] that type which are usually called "carrier convenience." Does that enter into it?

A. Yes, facilities enter into it quite a lot; not only station force but platform facilities.

Mr. Earnshaw: I think that's all I have. Thank you.

Redirect examination.

By Mr. Baumann:

Q. Mr. Gleaves, some reference was made to the fact that trains carry empty cars against what was termed the directional flow of traffic. Can you tell us what the empty car mileage in percent approximately is on the Frisco as of any given period that you know of?

A. The last few months it has been running around 34 percent of the total mileage.

Q. Is that high or low as reflected by your experience?

A. That's a little lower than it was before the war.

Q. Now, that includes all types of cars and equipment?

A. Yes.

Q. Now, reference was made to the fact as to why, if you had a car from I believe it was St. Louis to Tulsa, you loaded a merchandise car to that point. Do you have one in the reverse direction or not there?

A. Well, St. Louis to Tulsa we do have—

Q. St. Louis to Miami I believe there is no reverse direction, is there?

A. Afton.

[fol. 391] Q. Afton. Pardon me. There is no reverse direction. Why you didn't use the same car to return merchandise back in the same boxcar.

A. No. We wouldn't handle that— The chances are very remote that we would handle that car back to St. Louis empty. There would be a very small chance of that. It would be taken to the nearest station where it could be loaded with a carload. That might be Tulsa; that might be any other place around there close. We wouldn't send it back to St. Louis empty.

Now, if it were a foreign car and if we didn't need it for loading, we could turn it over to our connecting line at the closest junction. We wouldn't have to haul it back to St. Louis. We could turn it over to them anywhere else.

Q. Assuming the car we are talking about was a Santa Fe car, Atchison, Topeka & Santa Fe car, you would normally do what with it?

A. Normally we would keep it and load it. But if we did turn it back to the Santa Fe we would turn it over to them— If that car were close to Tulsa we would turn it over to them at Tulsa. If it were close to Kansas City we would turn it over to them at Kansas City. Or at Dallas or anywhere else; wherever the closest junction is.

Q. Now, do you ship much of this merchandise traffic in boxcars?

A. Almost exclusively.

Q. And do boxcars have many other uses besides moving [fol. 392] merchandise traffic?

A. They certainly do. A boxcar has no home nowadays.

Q. And a number of uses?

A. Yes, sir.

Q. Isn't it true that the bulk of the railroad traffic is carried in boxcars, the substantial bulk of it? Both carload and less-than-carload traffic.

A. Well, practically all the l. c. l. is handled in boxcars, and quite a large percent of the total carloading is handled in boxcars.

Q. And your utilization of boxcars is mainly a matter of demand requirements? Is that not what you base your utilization of boxcars on?

A. Yes, sir.

Q. You made a reference, I believe, to the movement of a peddler car of perishables out of Springfield towards St. Louis. Did you make a reference to something like that?

A. Yes, sir.

Q. Now, do you load ordinary merchandise in a perishable car or why not?

A. Ordinarily you don't.

Q. There's refrigeration in there, isn't there?

A. There is refrigeration in there.

Q. Now, when your department takes over and receives from the shipper a shipment, an l. c. l. shipment, does it [fol. 393] make any difference, so far as transportation is concerned, whether that shipment is interstate or intrastate?

A. No, sir.

Q. What is your main objective?

A. To get it to destination the quickest way possible.

Q. Now, reference was made— And I am taking this merely as an example of cars loaded off of the Frisco. You had a car that you load out of Springfield to Oakland, Calif.?

A. Yes, sir.

Q. Would that contain freight— Say if someone did ship something from Thayer, Mo., just southeast of Springfield, to Oakland, Calif., would that contain that kind of a shipment?

A. Yes, sir.

Q. Some reference was made as to the cost factor entering into your determinations and the setting up of the so-called merchandise schedules. Is that a controlling factor?

A. I would say it's one of the controlling factors.

Q. One of many, is that right?

A. Yes, one of many.

Q. Now, in the utilization of trucks in rail operations, speaking from the railroad standpoint, is the saving of car-miles and car-days a substantial factor in your using those trucks?

A. It is a very substantial factor.

Q. Can you give us any idea as to what that saving [fol. 394] amounted to for any given period that you have in mind that's within your knowledge?

A. We worked up a statement some time ago— December 29, 1945, we worked up a statement as to what handling would be necessary if we did not substitute any freight by truck. It would require 6,085 additional merchandise cars per month, 892,801 loaded car-miles per month. It would require additional freight train service, including engines, which we probably would not have available, and would cost $152,986.59 per month additional.

Q. In operating cost, you are talking about?

A. In operating costs.

Q. Now, just as an example, what would happen to service if this operation were curtailed? You have testified in several of the finance cases; not the particular subnumbers here. Now, let's take a shipment moving by rail from St. Louis, Mo., say, to Oswego, Kans. What kind

of service would you give there by rail? All rail, now. Speaking of the old days now.

A. Second morning.

Q. And what do you give them now?

A. First morning.

Q. And how is that accomplished?

A. By car, St. Louis to Afton, and thence to Miami.

Q. Isn't it a fact, Mr. Gleaves, that in a substantial part of the Frisco territory that you now give first morning and [fol. 395] first afternoon delivery, speaking in a general way, from various points because we have these termini? Speaking generally from the termini inward.

A. We attempt to give first morning service to all destinations within 300 miles.

Q. Of origin?

A. Of origin or the place where the car is loaded or starts out by truck, whichever it happens to be. We give first-day service as far as St. Louis to Tulsa; that's 424 miles. And St. Louis to Memphis; that's 305 miles. And I would say in practically all territory we are giving first-day service within 300 miles and in some cases farther than that.

Q. What was the situation, say, about 3 or 4 years ago when you came into this with respect to some of these areas out in Oklahoma, for instance, like Enid, that are off-main-line points? What kind of service did you give out in that territory generally?

A. Generally second-day service.

Q. Is that same thing true with this line extending from Springfield generally over to Wichita and Ellsworth?

A. You mean prior to the—

Q. Prior to the inauguration of this integrated truck service.

A. Yes. This coordinated rail-truck service has improved the time of delivery of those shipments at least 24 hours to all that territory.

[fol. 396] Q. Is the same thing true as to the so-called River Division of southeastern Missouri and northeastern Arkansas territory? Speaking now of small towns that lie off the main line.

A. It's improved—

Q. Such as Canalou, for instance.

A. It has improved it considerably because most of the train service on that River Division, the local train service, is triweekly, and when they peddled by cars there was considerable delay.

Q. Has this integrated or coordinated service enabled better transportation between those little towns in respect to l. c. l. merchandise? I am talking about the occasional merchandise shipments that go between some of those very small towns.

A. Yes, very materially.

Q. Now, Mr. Gleaves, in connection with the so-called break-bulk service, outside of the towns having a large population such as Springfield, Memphis, Kansas City, St. Louis, perhaps Dallas, Tulsa, and Oklahoma City, do you have or maintain any extended so-called loading gangs that you know of? Ordinarily now. The railroad I am talking about.

A. No, not any large force at any points other than those. And at some we have practically no force.

Q. And when the occasion arises for putting in a merchandise car to break bulk, you usually get your labor by the agent arranging for it? That's what happens, isn't it? [fol. 397] A. Yes.

Q. Does the fact as to whether or not you maintain a switching crew at a point have anything to do with your setting up a break-bulk car to that point?

A. It is almost impossible to have a break-bulk point at a place where you don't have regular switch engine service. And by that I mean switch engine service around the clock, 24 hours. These cars arriving during the night should be placed so that they could be opened up early in the morning and start working and in some cases opened at night.

Q. And, Mr. Gleaves, is that occasioned by the fact that the railroad crew that handles this local freight train consisting of anywhere from 40 cars up doesn't do any local switching? Is that the reason for the necessity of the local switch crew?

A. Yes. And in places where we have one switch engine and it works maybe from 10 a. m. to 6 p. m., our contract

with the Brotherhoods prohibits that crew from spotting any cars.

Q. You mean the road crew?

A. Yes. It either prohibits it or requires such heavy punitive payments that it is undesirable to do that.

Mr. Baumann: Mr. Examiner, I think between us we have explored a good deal of the field so far as this witness is concerned. He will be available as long as the hearing lasts. And we have Mr. English here.

Exam. Croft: I think we might excuse him if you would [fol. 398] like to.

Does anyone have any further questions?

Mr. La Tourette: I have just one or two questions.

Recross-examination.

By Mr. La Tourette:

Q. You mentioned, Mr. Gleaves, an additional item of cost of approximately $182,000, when you spoke of car saving, I believe. Have you any comparable figure respecting the cost to the railway for the service rendered by the Transportation Company on the property that was handled by it that would ordinarily be handled in those cars?

A. I don't have those cost figures.

Q. You don't have that?

A. No.

Q. Now, don't these crews operating these through trains do switching at certain points where you don't have switching crews maintained?

A. Well, it is very seldom done by any through freight crews. We have local crews that do the switching at all points where we don't have switch engines.

Q. Those local crews serve various points on the rail line and perform local switching?

A. Yes, they do.

Q. But you can set cars out by the use of these local crews even at points where you don't maintain a switching crew right at the particular point?

[fol. 399] A. Yes, that's true. But some of those are tri-

weekly, and they might come along through the town at 3 or 4 p. m. in the afternoon, and that's just a 24-hour delay to your merchandise because you can't deliver until the next day.

Mr. La Tourette: That's all.

By Mr. Earnshaw:

Q. I would like a little more detail on that $182,000. What period does that cover?

A. That's per month.

Exam. Croft: Let's not go too far into that question.

A. $152,986.59.

By Mr. Earnshaw:

Q. Was that supposed to be the complete additional cost to the railroad?

A. That's cost of additional freight train service. Additional merchandise cars, per diem, switching cost, and cost of additional labor.

Exam. Croft: Mr. Earnshaw, I don't believe there is in anyone's mind the matter of closing the door to auxiliary and supplementary service, and I don't want too much examination on it.

Mr. Earnshaw: That answers my question.

Exam. Croft: Are there any other questions of this witness?

You are excused.

The Witness: Thank you.

Mr. Earnshaw: That is definitely involved in the case, however.

(Witness excused.)

[fol. 400] Exam. Croft: We will recess at this time until 1:30.

(Whereupon, at 12:15 p. m., a recess was taken until 1:30 p. m. of the same day.)

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~636~~ 15

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., APPELLANTS,

vs.

FRISCO TRANSPORTATION COMPANY.

No. ~~637~~ 16

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL., APPELLANTS,

vs.

FRISCO TRANSPORTATION COMPANY.

No. ~~651~~ 19

INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

FRISCO TRANSPORTATION COMPANY.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

NOS. 636 AND 637 FILED DECEMBER 3, 1957

NO. 651 FILED DECEMBER 9, 1957

PROBABLE JURISDICTION NOTED FEBRUARY 3, 1957

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OCTOBER TERM, 1957

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

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Afternoon Session. 1:30 p. m.

Exam. Croft: You may resume when you are ready.
Mr. Baumann: Mr. English.

W. L. English was sworn and testified as follows:

Direct examination.

By Mr. Baumann:

Q. Will you please state your name?
A. W. L. English.
Q. Your occupation and address?
A. General manager of the Frisco Transportation Company and supervisor of motor transportation for the Frisco Railroad. And the address is Springfield, Mo.
Q. How long have you been employed by the Frisco Railway?
A. About 35 years.
Q. In what capacities, Mr. English?
A. Well, various capacities. I was originally connected with what was known as the Department of Development, having in charge colonization, agricultural development, and industrial development.
Q. Now, sometime prior to 1935 what position did you hold in the traffic department of the Frisco Railway?
[fol. 401] A. I was assistant to the vice president in charge of traffic.
Q. As one of your duties at that time, among others, was one of your duties the development of motor transportation?
A. Well, prior to 1935 about a year my chief duty was making a study of the possibility of establishing a motor service in some form in connection with the operation of the Frisco Railway and directed primarily to the method of handling and the improved handling of l. c. l. merchandise. That was prior to the passage of the Motor Carrier Act.
Q. Now, did that study continue after the passage of the 1935 Motor Carrier Act?

A. Yes, it did. Immediately after the passage of the Act I made a recommendation to the officials of the Frisco that they do two things: One, start a truck line of their own through a subsidiary; and, another, to make use of independent truck lines in the handling of freight in substitute service in certain territories where it was evident at that time that the Frisco Railroad could not buy truck lines then in operation. That recommendation was approved and an organization created and the company incorporated, and I was made general manager.

Q. Now, has that same policy continued since the organization of the Frisco Transportation Company?

A. Yes, sir. There has never been any substantial change in the original plans, which were, as far as the operations of the Frisco Transportation Company itself [fol. 402] was concerned, that existing truck lines be purchased with the intention and hope of acquiring all the rights that the purchased line had at that time, to be operated as they had been formerly, in addition to which it was, of course, the purpose of the Frisco Railroad to make use of this line to handle the rail freight in substitute service.

Q. Now, can you tell any reason of record why you didn't undertake to acquire these rights by the method commonly termed as a proof of convenience and necessity under part II of the Act?

A. Well, as the result of several years of study I had made I was convinced personally, and convinced the officials of the railroad, that under conditions at that time it would not be possible in the thinly populated and rough country such as the Frisco operates in to perform a service of any other kind; that it would need the combined service to make the line effective. And the only way that could be done was by purchases.

Q. And was it your intention thereby to furnish to these many communities a dual service, both for rail freight and so-called common motor carrier freight?

Mr. La Tourette: May we suggest that the counsel not lead the witness on an important question like this?

Exam. Croft: I don't think that the answer to the prior question was responsive either.

By Mr. Baumann:

Q. Well, Mr. English, in your own way will you state the reasons why you recommended and the railroad [fol. 403] founded this subsidiary and proceeded by purchase to acquire rights rather than to acquire operating rights limited to a handling of rail freight at rail rates?

A. A recommendation was made, as the result of a prior investigation that I had personally conducted, that such an operation, based on a truck service to the public through the purchase of existing truck lines plus the handling of rail freight for the railroad in substitute service, would make the Frisco Transportation Company self-supporting. There would be no occasion for any discussion of subsidies or anything of that kind. And that the service to the public would be better than if performed in any other manner.

By Exam. Croft:

Q. Going back to Mr. Baumann's original question, why did you elect to proceed by purchase rather than under section 207 by an application for whatever type of authority you wanted?

The Witness: You might read his original question, and we will go back to that.

By Mr. Baumann:

Q. That was substantially the question. Why did you select that method as against the other method?

Exam. Croft: If there was any particular reason for it, and I assume there was.

A. There was a particular reason for it. The reason was that I was convinced myself that it was, first of all, the proper thing to do; that it added no new competitor [fol. 404] over the highways we proposed to operate over. And I was convinced that we could thereby avoid any likelihood of an authority being issued restricting the service to handling rail freight only, such as I thought at that time we might have if a convenience-and-necessity application were made.

By Mr. Baumann:

Q. Now, has the Transportation Company generally followed through on that policy in setting up its lines?

A. We followed through on that policy wherever we could find lines that we could purchase that we considered were worth the purchase price, that had business enough to justify their purchase, and in connection with which a further study had shown that the railroad could benefit by the use of them. We followed it consistently with three exceptions, and all three of those exceptions were the result of our inability to purchase a line under satisfactory arrangements.

Exam. Croft: May I interrupt just once more?

By Exam. Croft:

Q. Going back to the original question, then, is it accurate to say that you elected to acquire your rights by purchase rather than under section 207 because you thought that, proceeding in that manner, you had a better chance to get unrestricted rights than if you proceeded otherwise?

A. Yes, sir. That is fundamentally the only reason for our electing to do that.

Exam. Croft: Thank you.

By Mr. Baumann:

Q. Did you want to say anything in connection with the [fol. 405] other point or not?

A. Well, the three exceptions, two of them very small: One between Lake City and Nettleton, Ark., about 10 miles, failed to connect up the so-called Bennett purchase between Blytheville and Lake City. And we asked for authority for all-out service in connection with that segment under a convenience-and-necessity application because there was no truck line available we could purchase.

Q. Is that the so-called Sub 10? A. That's the Sub 10.

Mr. Damon: No. That's Sub 4.

By Mr. Baumann:

Q. Pardon me, that's the so-called Sub 4?

A. Yes. Bennett is Sub 10, and this is Sub 4.

Q. All right.

A. Then there was another small line under exactly similar conditions in that immediate neighborhood—that is, from Marked Tree north. Both of those, when finally granted, carried restrictive provisions, with which we have complied.

The larger case is shown on this map and is referred to as Sub 15, a convenience-and-necessity application covering the territory on the River Division of the Frisco from St. Louis, Mo., south to Blytheville, Ark. That application was granted with restrictions. I recommended that we not accept it on account of those restrictions, and that later was rejected.

In the meantime, later on, perhaps 18 months later, we [fol. 406] did find it possible to buy a line in that general territory known as the Righter Truck Line, and we then filed an application to purchase that line.

By Exam. Croft:

Q. That short second segment that you described: Was that also covered by the Sub 4 application or did that take another application?

A. Yes, sir; that was in the Sub 4, too.

By Mr. Baumann:

Q. In other words, the Sub 4 application is the only one presently in effect that was a certificate of convenience and necessity case?

A. That's correct. The only operation we have on the whole system today—

Q. That has that restrictive clause in it?

A. The restrictive clause in it. The Sub 4 probably—I couldn't say the exact mileage but somewhere around 45 or 50 miles.

Q. Now, in connection with the Hugo-Paris operation, wasn't a convenience-and-necessity application filed down there after you purchased the Rose operation?

A. Yes, sir; that's correct.

Q. I am just putting that in. That's reflected by our certificates. And has that any restrictions even though it was granted by public convenience and necessity?

A. No, sir; there are no restrictions there.

Q. Now, Mr. English, up to and including the present time—

[fol. 407] A. Mr. Baumann, may I make this explanation of that? Perhaps what I said doesn't cover the whole thing. The original application was a purchase, but that was only south-bound, from Hugo to Paris. And later we filed an application to make it north-bound, and that was given without restrictions.

Q. Now, in connection with this Sub-No. 4, after you received the certificate of convenience and necessity with the restrictions, did you put into effect, and for a long time maintain, motor-carrier rates over that route?

A. We did; yes, sir.

Q. And why were they discontinued?

A. They were discontinued as the result of a decision in the T. & P. case—I can't recall the case number—as a result of which the secretary of the Interstate Commerce Commission served notice originally, as I understand it, on the T. & P. that they would have to remove their line from all truck tariffs in the territory involved in that hearing.

They also wrote all truck lines—at least, all in this territory—railroad-owned or controlled that had the restrictive provisions in their certificates, first advising them to go out of all the tariffs and later what we construed as an order to get out. We complied with that order and put ourselves out.

Q. As to Sub-No. 4?

A. As to Sub-No. 4.

Q. That was the only time they ever asked you to take [fol. 408] out any motor tariff?

A. That's correct.

Q. Now, ever since you consummated these purchases, do you now maintain a full line of motor-carrier rates under the name of Frisco Transportation Company?

A. We do; yes, sir.

Q. How are those published?

A. Published by the various truck bureaus in the territory we serve. Most of them are published by the Middlewest Motor Freight Bureau, located here in Kansas City, and the Southwestern Motor Freight Bureau at Dallas and the Mississippi Valley Motor Freight Bureau, St. Louis. And then we are parties to a number of others on the outside of our territory that have rates covering certain segments of the territory we serve.

Q. Do you hold an office in the Middlewest Motor Freight Bureau?

A. Yes, sir. I have been a member ever since we started in the trucking business, and I am a director in the Bureau.

Q. Does Mr. Thomas, who is your chief general freight and passenger agent, actively participate in rate matters in that Bureau as well as all others?

A. Yes. He handles all rate matters in connection with the Frisco Transportation Company, and he is a member of what they call the rate committee of the Middlewest Bureau and also the overhead bureau that reviews all truck rates that come before that bureau.

[fol. 409] Q. Does he and other members of your personnel appear in proceedings in connection with motor-carrier rates?

A. Yes, sir. We have tried to do everything that any what we consider legitimate truck line would do in connection with all the truck lines in the territory we serve. We participate in rate discussions and rate hearings, and we pay our share of the expenses attached to those and are quite active in all the States we serve. We try our best to carry our full share of the burden of the general overhead expenses of operating trucks.

Q. Do you in that connection maintain through rates with other carriers and interchange with them?

A. Yes, sir. About, oh, roughly, I would say 30 percent of the truck business the Frisco Transportation Company handles is interline freight with other truck lines. We have divisions with nearly all the truck lines we connect with.

Q. Do you still have trailer-interchange arrangements with truck lines?

A. Yes, sir; we have. During the war, when trailers were scarce, when our supply of trailers compared to the business we had was perhaps a little greater than many of the others, especially smaller lines, we did a great deal of trailer inter-change in order to help truck lines that were short on trailers, and to avoid loading and unloading and the delay incident thereto.

[fol. 410] Q. Is the Frisco Transportation Company a member of the American Trucking Associations?

A. Yes, sir; we have always been a member of the American Trucking Associations.

Mr. Earnshaw: Perhaps by way of clarification it should be pointed out that the membership is usually through the State associations in connection with the A. T. A.

By Mr. Baumann:

Q. Are you a member of the Missouri State Association, affiliated with the American Trucking Associations?

A. Yes, a member of all the State associations of the States we serve, including Missouri. And, while it is true that entitles you to membership in the A. T. A., I notice there are still dues to the American Trucking Associations.

Mr. Earnshaw: Direct contributions for a specific purpose.

By Mr. Baumann:

Q. Now, Mr. English, you spoke of the performance of substitute service. You also have a capacity with the railroad as director of motor transportation. Is the Frisco Transportation Company the only motor carrier that performs substitute service for the Frisco Railroad?

A. Oh, no. We have had other motor carriers performing substitute service for the Frisco ever since I took over the position as the supervisor of motor-carrier service. I would say 10 years at least. It varied in number from 3 or 4 up to as high as 12 or 14.

Q. At the present time what other motor carriers per-

[fol. 411] form substitute service with the Frisco Railway?

A. Highway service, you mean?

Q. Highway service I mean, yes.

A. Well, Campbell "Sixty-Six" performs a substitute service for the Frisco Railroad between Springfield and Mount Vernon.

By Exam. Croft:

Q. How long is that?

A. About 32 miles.

And between Joplin and Minden Mines, Mulberry.

Q. About how far is that?

A. Minden Mines, Mo., and Mulberry, Kans. That's about the same distance. Probably about 35 miles.

The Lile Truck Company from Fort Smith, Ark., to Mansfield, Ark. I don't know just that distance. Approximately 50 miles. If we had a time card I could tell.

Q. Well, I am just interested in approximately the mileage.

A. And the Smith Brothers Truck Line between Monett and Seligman, Mo., a distance of 40 miles.

The Rich Truck Line between Springfield, Mo., and Ozark, Mo., 16 miles.

Now, during the war we had interchange arrangements for truck and rail freight through ODT approval with perhaps 30 truck lines altogether. Those were temporary war measure arrangements where the Frisco Transportation Company took over their freight—

By Exam. Croft:

Q. So-called joint action plan?

[fol. 412] A. So-called joint action plan.

Those were all, of course, abolished when ODT 3 was closed out. There was about, I think, at one time a maximum of 31 altogether.

By Mr. Baumann:

Q. You mean by that that the Frisco Transportation Company hauled freight for other truck lines under its joint action plans?

A. We either gave them our freight or they gave us theirs. It worked both ways.

Q. Well, which was in the majority?

A. Well, a majority of them, at their own request, the F. T. C. handled their freight. It was generally some line with more tonnage than they had equipment for or over territory where neither one of us had enough freight to justify two sets of service. But I expect, out of that 31, in the case of about 18 or 19 of them the F. T. C. took over the other operator's freight.

Q. In other words, they turned over to you this l. t. l. freight for you to haul to certain destinations?

A. That's correct.

Q. Were those destinations usually rail destinations as well as highway destinations?

A. Yes, sir. Most of them were rail destinations.

Mr. Earnshaw: Mr. Baumann, you said truck and rail both in connection with that. Could you get out what he [fol. 413] meant by the rail part of it?

By Mr. Baumann:

Q. By the term "rail freight," as stated in that question, what did you understand me to say?

A. Well, this joint action affected both. The substitution of rail for truck or truck for rail or truck for truck. It worked in either case in all ways.

By Exam. Croft:

Q. In other words, by reason of the joint action plan it sometimes happened that independent carriers other than those you have named hauled Frisco Railroad freight?

A. That's right. And also the Frisco Railroad handled a great deal of their freight. We had at times as much as 10 or 15 cars a day of that type of freight.

By Mr. Baumann:

Q. Now, Mr. English, is the Frisco Transportation Company subsidized in any way by its parent company?

Mr. Earnshaw: Object.

Mr. Baumann: Why?

Mr. Reeder: It calls for a conclusion of the witness.

Exam. Croft: I think it calls for a conclusion. I would like to know, but I think we are going to get into awfully deep water very shortly.

Mr. Baumann: I think it is decidedly pertinent in these types of cases for several reasons. We have been bombarded in these briefs by subsidies and what have you and control. And Mr. English has been on the stand in at least four or five or six cases, and the same question has been asked and allowed in finance cases, and generally [fol. 414] it's admitted, except recently, that there was no subsidy existing between the Frisco Transportation Company and its parent company.

Exam. Croft: Well, I shall certainly overrule the objection to the question.

Mr. Baumann: I can start out and lead point by point and develop it if it will be easier. I think Mr. English understands the question.

Exam. Croft: I don't think that's necessary, but I think that before we get through the general statement will be subject to cross-examination which will cover the same territory. We aren't going into the accounting practices and so forth as much as we did yesterday.

I think it is undesirable for the railroad to subsidize an independent motor service, a service other than auxiliary and supplementary. And I don't know that the witness's conclusion is going to be enough to negative that.

Mr. Baumann: I am going to withdraw that question. I will just withdraw the question.

By Mr. Baumann:

Q. Now, Mr. English, does the Frisco Transportation Company maintain separate freight houses from that of the Frisco Railroad in certain centers, and will you name them?

A. It does it on our main terminals.

Q. And those main terminals are located where?

[fol. 415] A. St. Louis, Memphis, Kansas City, Joplin, Springfield, Tulsa, Oklahoma City, Wichita, Dallas.

Q. Now, at these separate freight houses what freight do you receive there?

A. We have our own agents and our own clerical force and our own dockhands; everything pertaining to our own business. We handle it exclusively by our own employees.

Q. Now, Mr. English, in a certain part of northeast Arkansas and southeast Missouri you have a special kind of traffic that you handle for the railroad. What is it, and how do you handle it?

A. Well, we have an arrangement down there for handling cotton from gins located on the Frisco Railroad or adjacent to it to the compresses located in that territory. That cotton has been so handled for the past 6 years. The service was established as the result of difficulties the railroad was having in picking up cotton and delivering it to compresses without serious delay.

The gins want to operate by ginning cotton today and having it in a compress tonight and drawing a draft against it in the morning. We established a service down there that would permit that.

Q. Can you outline about what area we would term the cotton-producing area in which you render this service?

A. The northern compress that we handle is at Sikes-[fol. 416] ton, Mo. And the other compresses in that territory are at Walnut Ridge, Ark., Jonesboro, Ark., Trumann, Ark., West Memphis, Ark., Leachville, Blytheville, Arbyrd, Mo., Evadale, Ark., Dell, Ark., and Osceola, Ark.

The cotton that the Frisco Transportation Company picks up and moves to these gins includes all the cotton-producing area adjacent to the Frisco Railroad in northeast Arkansas and southeast Missouri. The tonnage handled ranges from 100,000 bales a year to 130,000 bales a year.

Q. How long has that service been going on, about?

A. Well, ever since 1941.

Q. Does the Frisco Transportation Company make its own individual reports to the Interstate Commerce Commission, separate and apart from those of the Railway Company as required by the ICC?

A. Yes, it does; and all the State Commissions as well.

By Exam. Croft:

Q. Before we leave this cotton traffic: I may be mistaken there. Does that traffic move on rail billings at rail rates?

A. It moves pursuant to the terms of the transit tariffs published by the railroad.

Q. In other words, it moves at rail rates and rail billing?

A. Yes, sir.

Exam. Croft: Subject to transit privileges.

Mr. Baumann: The purpose in calling your attention to [fol. 417] it, I might say, Mr. Examiner, is that that cotton territory is closely related down there, and it has its focal point at Memphis.

By Mr. Baumann:

Q. Isn't that right, Mr. English?

A. Yes, that's true.

Mr. Earnshaw: Well, might I ask if the applicant concurs in those rail tariffs on that particular tariff?

By Mr. Baumann:

Q. How is that handled? How is the Frisco Transportation Company permitted to perform that service?

A. It performs it in substitute service.

Q. Under what tariff; do you know?

A. Well, under the— I can't say as to that. Under Ex parte 129, I guess. It's all l. c. l. movement, cotton. We perform the substitute service just like we do substitute service on any other l. c. l. freight. Of course, it's covered in Kipp's tariff. That is, the authority as far as the territory is concerned is authorized in Kipp's tariff.

By Exam. Croft:

Q. Is any of that cotton picked up at off-route points?

A. No, sir.

Q. It is all delivered to rail stations?

A. Yes, sir.

Q. The same as any other rail freight?

Mr. Baumann: No, that isn't quite right.

By Mr. Baumann:

Q. Is it, or isn't it, picked up at gins on the rail stations? [fol. 418] A. It is picked up either at the gin platform that's on the right-of-way— It has been delivered to the Frisco Railroad in Arkansas, Mr. Examiner. There is a local law which permits any ginner or farmer to put one bale of cotton or any number he wants on the right-of-way, and that is a delivery to the railroad.

But the cotton is billed on a railroad billing and it is delivered to a railroad property before we touch it. Now, the Frisco Transportation Company formerly had a local Arkansas tariff which covered the hauling of cotton from the interior gins to the railroad. And they authorized the F. T. C. to serve any gin within 5 miles of any highway over which the company had rights to operate.

By Exam. Croft:

Q. What do you mean, "they" authorized?

Mr. Damon: The Arkansas Commission.

A. The Arkansas Commission authorized it.

By Mr. La Tourette:

Q. That's on intrastate traffic?

A. That's right.

By Mr. Baumann:

Q. Now, Mr. English, when this cotton is picked up at the railroad right-of-way does the truck take it to the rail station at that point or does it take it to some other point?

A. It takes it to some other point.

Q. What type of cotton plant is located at that other point?

[fol. 419] A. A compress.

Q. I believe you named the compress points.

A. I have named the compress points.

Q. Now, is Mr. John S. Essex your chief accountant?

A. He is; yes, sir.

Q. Do you make periodic settlements between Frisco Transportation Company and the Frisco Railroad covering interline and services rendered one for the other?

A. Yes. We make a settlement once a month, generally about 30 days in arrears.

Q. That 30 days in arrears is due to what?

A. Well, the necessary time it takes the Frisco to check the accounts and verify them.

Mr. Baumann: That's all for the time being.

Exam. Croft: Mr. Earnshaw?

Mr. Reeder: Before we start the cross-examination, any of us, could I ask if Mr. Essex's testimony in its entirety—that is, the direct, cross, redirect, recross, and so on—may be considered in this record for all purposes and not limited to the motion?

Mr. Baumann: There is no such commitment as that in the record, and we are not willing to make one to that effect at the present time.

Exam. Croft: Notwithstanding Mr. Baumann's statement, I am not so sure it isn't available for all purposes. [fol. 420] Mr. La Tourette: All I understood was that the testimony went in over objection as to putting the testimony on.

Mr. Baumann: No.

Exam. Croft: That particular testimony was offered in support of an objection and motion to discontinue. But nevertheless it went in at a hearing that's unrestricted, and I think it's in the record, and I am disposed to the view that we can consider it for any purpose for which it is pertinent.

Mr. Reeder: Well, if a motion to that effect be necessary, I think protestants at this time would like to make a motion.

Exam. Croft: If not, I think we ought to get Mr. Essex back here to say it under subpoena because I think some of that is desirable.

Mr. Reeder: That's the thought I had in mind.

Mr. Baumann: With that thought in mind, of course subject to our objections raised at the beginning as to the materiality, we will agree to it for that purpose.

Cross-examination.

By Mr. Earnshaw:

Q. Mr. English, I wanted to be sure that I understood your points as to the reason you gave for referring the purchase method to the new application method in obtaining rights. At the time that this policy was adopted, had the Commission issued any restrictive orders to railroads and subsidiaries?

A. No, not at the time the policy was formulated they [fol. 421] hadn't. I don't recall that they had issued any orders at all; that is, in conformity to the Motor Carrier Act, 1935.

Q. So that the fear of restriction was one and perhaps one of a number of reasons which underlay the adoption of the original policy?

A. The belief that we would escape restrictions if we purchased lines, yes.

By Exam. Croft:

Q. Didn't you say a moment ago that it was the fundamental reason?

A. Well, it is the basic reason. It's the main reason, the most important reason.

Exam. Croft: My recollection may be wrong, but I believe you said it was the fundamental reason or words to that effect.

By Mr. Earnshaw:

Q. Well, the thing I am not quite sure about is why you thought at that time, before there were any ICC decisions on the question, that any new rights you acquired would be restricted.

A. Well, I can't remember all the details of the discussions we had that long ago about it, but it was no doubt based on a study of the Motor Carrier Act itself and things

of that kind. Being determined, if possible, that we would have a line that could perform that kind of service, we went just as far as we thought was necessary, which included the purchase of lines to avoid anything in the way of restrictions.

Q. Does your company keep any separate records of the [fol. 422] loading of its trucks, divided between rail substitution freight and general nonrail freight?

A. Well, not individual trucks, no. But we do keep a very close record of the total volume handled on rail freight and common-carrier truck freight.

Mr. Baumann: I believe one of Mr. Essex's exhibits had it.

By Mr. Earnshaw:

Q. I am not asking for totals. I am asking for the individual load factors of the individual routes.

A. No, sir. There is nothing of the kind. There are no such records.

Q. You don't have any such records available?

A. I not only don't have them available here, but I don't have them available at all. We have never kept any such records.

By Exam. Croft:

Q. The rail and motor freight is commingled in the same vehicle, is it not?

A. It is.

Q. Loaded by the same employees?

A. It is.

By Mr. Earnshaw:

Q. Do you also handle Railway Express freight on any of those operations?

A. Yes.

Q. United States mail?

A. Well, we have a separate organization, a bus line, that is handled independent and separate of our truck service, and on that we handle mail, passengers, baggage, and express.

[fol. 423] Q. Has Frisco Transportation Company originated any joint-rate arrangements with connecting independent carriers?

A. Yes, sir. We have originated a great many of them ourselves, and we have developed perhaps an equal number on invitation of the joint carriers. We did originate ourselves a divisional basis for the southwest territory, which was discussed with other carriers and which was adopted and is now in general use.

Q. That basis is in general application between motor carriers in the territory?

A. Yes, in the territory. Not universally but in the southwestern territory.

Q. Mr. Essex stated yesterday that no separate cost study or cost segregation had been made for the handling of the rail freight. Is that also the case as to your department?

A. Yes. The only cost studies that are made are made by Mr. Essex on instructions from me. And we have never made any and have never determined any formula by which we could arrive at a cost study that we considered to be of any value to us.

Q. Segregating the rail—

A. Yes, segregating it from there on.

Q. Segregating the handling of the rail freight from the other freight.

A. Yes.

Q. Are you in charge, amongst other things, of the solicitation on behalf of applicant?

[fol. 424] A. Yes. I have been connected with the traffic department of the railroad and still am normally. And we have in the Frisco Transportation Company a traffic department made up mostly of our rate department. We have two solicitors reporting direct to our traffic department, whose chief job it is to solicit the freight.

By Mr. Baumann:

Q. Which traffic department? Frisco Transportation Company?

A. Frisco Transportation Company traffic department.

By Mr. Earnshaw:

Q. There are two solicitors reporting directly to whom?

A. Well, they report to our traffic officer.

Q. That would be Mr. Coulter?

A. No. To the Frisco Transportation Company traffic officer. We have a traffic manager. He reports to me in the Frisco Transportation Company. He has a rate department under him directly; and in that rate department are two men whose chief duties, I will say, are to solicit truck freight.

Q. Where are they located, Mr. English?

A. One of them is located at Dallas and one at St. Louis.

Q. Are they traveling solicitors?

A. Yes, they travel. They are generally held to be available to rail solicitors when they get up against some problem more or less difficult for them to handle in connection with some movement which might be joint rail and truck.

[fol. 425] By Exam. Croft:

Q. Do they in their activities solicit for the railroad also?

A. Well, yes. They have been told to whenever they can, and railroad men have tried to inform them and keep them informed about the services of the Frisco Transportation Company. I don't know in either case of any direct solicitation on either hand. But they do make a practice that if they find some business that the other branch is interested in to tell them about it, and to get them together, things like that.

By Mr. Earnshaw:

Q. In normal times would you have the same number of solicitors or more or less?

A. We didn't have any until war conditions just forced us to put some on. At one time we had five. It has been reduced to three. My intention is to just reduce it two more.

Q. Well, let me understand you. You said at one time you didn't have any.

A. That's right.

Q. And at a later time you had five.
A. Two years ago we put on five.
Q. I see.
A. The 1st of January we took off three of them.

By Exam. Croft:

Q. I think Mr. Earnshaw's thought was—and mine was the same—that the war would rather be expected to reduce the number of solicitors that you hired instead of increasing them.
[fol. 426] A. No, not if those men are employed to help take care of the movement of freight.
Q. They weren't really solicitors in the technical sense?
A. No. They were officially. They were put on to solicit freight. But their chief job, and the thing we had them on for, and the reason we finally let them out here lately, was because of the difficulties of handling especially Government freight. With the very small supervisory force that this company had, we simply were not in position to get around to it, and it was delaying the movement of the freight, and they were put on more or less for that purpose. Of course, they were to solicit any freight they could get that they knew we were in position to move.

By Mr. Earnshaw:

Q. Well, during what period did you have no solicitors?
A. From 1937 to 1942 we didn't have any.
Q. And the company was in full operation at that time?
A. Well, they had reached full operation by that time.
Q. Now, how did they acquire all the freight during that period from 1937 to 1942?
A. Well, we had a very fair backlog of freight that came to us from these companies we acquired. The rest of it came to us without any direct, definite, station-to-station solicitation.
Q. Would it be fair to say that it came at least as an indirect result of the railroad solicitation?
[fol. 427] A. No, sir. Nobody can say how much effect that had. My opinion is that it has had none at all. If I had to buy it I wouldn't give anything for it, at least, although I

am not saying that it didn't have. The Frisco solicitors might have had their acquaintanceship and things indirectly that might have had some influence. And the fact that the company was owned by the Frisco Railroad might have had some influence on shippers who liked the Frisco to give the truck line some of their business, too.

Q. Now, conversely, under this present solicitation arrangement, I think you already stated or left the impression that to some extent when the shipper would not use truck service between certain points, as a result of that solicitation activity the railroad would be likely to get some of the movement as an indirect result of his activities?

A. Oh, I think that's— Yes. I think that could easily happen. It probably has happened.

Q. And you recognize, of course, the fact that for the last few years the truck rates, generally speaking, have been on a higher basis than the rail rates?

A. Yes.

Mr. Baumann: Mr. Examiner, I am going to register a very customary and usual objection in that rates haven't a thing to do with operations or operating certificates.

Mr. Earnshaw: I don't intend to labor the point, Mr. [fol. 428] Examiner. It's something that we all know, and it is definitely inherent in this whole situation.

Exam. Croft: That has no materiality in the usual proceeding. But I don't agree with you in this case, Mr. Baumann. If you were engaged in one type of service exclusively, I would certainly agree with you; but when you are combining two types of service, where the prevailing rates are different, why, I think it is decidedly material as to the need for a restriction of some type.

Mr. Baumann: Will I be permitted, then, to develop how this occurred and whose fault it was? Or shall I say "how it occurred"? Because we are meeting the same question we have met in our last several cases. I have raised the same objection, and your Commission has said that that isn't a matter for a proceeding of this kind. I will register the objection.

Exam. Croft: A maladjustment in existing rates is no reason for the authorization of additional services.

Mr. Baumann: It is not a—

Exam. Croft: The issue here is completely different.

Mr. Baumann: It has been held not to be a reason for the denial of a purchase, too.

Exam. Croft: I am not familiar with that decision. I will take your word for it.

Mr. Reeder: Well, that could be true and still not be inconsistent.

[fol. 429] Mr. Baumann: The issue here now is this: We are willing to admit there is a difference in the rate and let Mr. English explain how it came about. But if that goes in I have a few other matters that I didn't consider pertinent which I would ask to be put in.

Exam. Croft: Well, that's your privilege. But I do think that there is inherent in your present type of operation at least the opportunity for undesirable practices. Now, I say that without making any accusations. There is at least the opportunity, which suggests a need for protective restrictions. And I think we ought to explore the possibilities under your present type of service.

Mr. Baumann: Are we also, then, going to explore the possibilities of the increasing of rail rates and go into that service also?

Exam. Croft: You might argue that that would be a curative measure, but I don't know that there is any possibility of forecasting the future on that in any way.

Mr. Baumann: With a 16-cent-an-hour increase in wages recently awarded.

Mr. Reeder: Well, suppose the rail rates go higher than the trucks.

Exam. Croft: Then it works the opposite way.

Mr. Baumann: Then you fellows ought to quit competing with us on that basis because of the difference in rates. [fol. 430] If these protestants are willing to agree that the sole reason why we should be restricted is the rate situation, we will take that as the only issue in the case.

Mr. Reeder: Oh, I would never agree to that.

Mr. Baumann: But it has been persistently raised. It is the sole reason stated by Examiner Waters and in the M. & A. case and in the Righter case.

Mr. Reeder: In the Campbell case it is stated as being a very definite reason why restrictions should be fixed.

Exam. Croft: It can't be considered the sole reason. There are obviously other reasons. I think the applicant may explore all of them here.

Mr. Baumann: All right. Go ahead. I'm sorry I interrupted.

Exam. Croft: I think the discussion has been helpful. That's the reason I let it go on so far. But I don't believe there is any other question pending.

Mr. Earnshaw: Was there an answer to my question, Mr. Reporter?

(Record at page 193-A hereof read by the reporter.)

By Mr. Earnshaw:

Q. Do you know the measure of that difference, Mr. English?

A. Yes, in a general way. When we first absorbed these truck lines—

By Exam. Croft:

Q. Well, let's just say, Has it been enough to influence the traffic one way or another?

[fol. 431] A. Well the increase today is about 6 percent over the rail rate. There are exceptions to that, but, in general, that's about what it has been.

By Mr. Earnshaw:

Q. I would like to digress for a minute and revert back to your testimony about the Sub 15 case. As I understood it, you said that the operation was conducted as a combined substituted service operation and an all-truck operation.

A. No, sir. We never operated Sub 15.

Q. No substituted service?

A. No service of any kind.

Mr. Baumann: The Sub 4.

By Mr. Earnshaw:

Q. The Sub 4 service.

A. Sub 15 is the line from St. Louis to Blytheville. That was revocated before we ever established any service on it at all. Sub 4 was the little line which had auxiliary and supplementary restrictions in, but we operated it, performing truck service at truck rates over those segments until we were ordered to remove those lines from the tariff.

Q. In the case of a movement between A or B which moves under substituted service, does the shipper receive any different service than he would if it were an all-truck shipment when the operation is that of the Frisco Transportation Company in either case?

A. Yes, there are some differences. One is that if he bills [fol. 432] it on a rail billing he must either deliver it to the station himself, for which they generally claim an allowance of 5 cents a hundred, or order the railroad to pick up and deliver and to come and get it and take it to the railroad.

From there on it's accorded the same service to the delivering depot; the two types of service would be substantially the same or exactly the same until it gets to the destination station. There the rail freight is turned back to the railroad, and the truck freight is delivered by a truck line. Normally our service, except at larger towns, is more or less of a direct delivery and all under the control of the Frisco Transportation Company. That's about the only difference I think there would be in the services.

Q. Is there any actual difference as between the time consumed in transit?

A. Generally there is some difference.

Q. A substantial difference?

A. Well, anywhere from a few hours to a half a day.

Q. Does the Frisco Transportation Company perform the local pick-up and delivery for the railroad at certain points?

A. We have 23 stations on the Frisco Railroad where the Frisco Transportation Company, independent of their

substitute service, performs pick-up and delivery for the railroad. Either all of it or part of it.

Q. And when you say "independent of the substituted [fol. 433] service operation," does that mean that under no circumstances could the same pick-up truck pick up rail freight and truck freight on the same trip?

A. Under our set-up that couldn't happen.

Q. You use different trucks?

A. The railroad freight that we haul in substitute service is delivered back to the railroad and taken into account. The bills are prepared and the bills expensed, and then the freight is handled in trucks that have no license to even go outside of the city and delivered as pick-up-and-delivery service.

By Exam. Croft:

Q. I wonder if you understood Mr. Earnshaw's question. At some places you use common stations, do you not?

A. Yes.

Q. Now, if at one of those places you perform c. and d. service for the railroad, is it not the practice to pick up both rail freight and motor freight in the same pick-up equipment?

A. Oh, locally, yes, sir.

Q. And make deliveries in the same truck?

A. Oh, yes. If that's what he meant, I misunderstood him completely. Sure, we use the same equipment to pick up both.

Q. Well, you do it at every point, do you not, where you perform c. and d. service for the railroad?

A. For the railroad; yes, sir.

Q. And what you meant by the word "independent" [fol. 434] back there was that the c. and d. service was performed under a different contract than that under which auxiliary or supplementary line-haul service is performed?

A. That is correct. We have exactly the same contract with the railroad that all of our c. and d. men have.

Mr. Earnshaw: Thank you, Mr. Examiner.

By Mr. Earnshaw:

Q. Have you made any comprehensive survey of the actual time in transit for shippers of less-than-carload freight as opposed to less-than-truckload freight between different points on your line?

A. No, I have not.

Q. So that any differences in time that might have occurred would be apt to be sporadic until you get a comprehensive survey through and can tell what the situation is?

A. Well, the railroads, before they arrange for substituted service, make a study, and some of that has been done in conjunction with our own men as to what kind of service we could give. And, applying that to the service they then have, they determine whether the expense of substitution would be justified by the time saved. Those are usually individual cases as they arise.

Q. At the time the rail and truck rates were on a comparative control, did the railroad succeed in capturing the traffic of that kind in competition with the independent truckmen and in competition with the Frisco Transportation Company?

[fol. 435] A. They didn't, and they never have since, with respect to the Frisco Transportation Company. I can't tell you about any other truck line except what I know about their tonnage. But I do know with respect to the Frisco Transportation Company that we have had the same relative increase in our business on higher rates since they were effective, as far as I can tell, that we had before it. For instance, at Joplin, Mo., where all the traffic is handled in substitute service, the Frisco Transportation Company has more tonnage in and out of the local territory than the Frisco Railroad has.

By Exam. Croft:

Q. And that suggests another question. I dislike to keep interrupting here, but it seems to be an appropriate point. I will lead up to it in this way: At those points where you use common terminals what is the character of your telephone listings. Do you have the same telephone?

A. No. We have our own telephone at all our terminals. That is, with our own number.

Q. That is, the Transportation Company has a different number?

A. That's right.

Q. What I was leading up to is, Who determines how a particular shipment shall be billed? The shipper calls for a pick-up. Now, you take it from that point on and tell us who makes the election and how it is made.

A. The shipper must deliver to that pick-up a bill, which shows whether it is going to go Frisco Transportation [fol. 436] Company or Frisco Railroad.

Q. Well, habitual shippers, of course, stock those bills, but many of them do not, do they? Isn't that true?

A. Well, we occasionally get some bills that don't designate what they want. In those cases the instruction of the agent is to call the man and ask him how he wants it to go and to give him any information he asks for as to the service and the rates, if they ask about it; but to insist that he say himself and to tell him in the meantime that he can't submit bills to a pick-up-and-delivery man hereafter unless he has designated how he wants the movement to be handled.

Q. Now, in making that election isn't it the practice of the shipper to inquire or to indicate the type of service that he desires before he elects which billing to use?

A. Well, of course, most of them know. That is, your regular shippers naturally know. A great many inquiries are as to whether or not you have a substitute service out to some local town where it is a local drop shipment. "Is this going to move on a railroad train or does your substitute-service truck handle this freight?"

Q. All right. Assuming that you have a habitual shipper who knows that auxiliary and supplementary service is available, isn't it the practice, without exception, to use the rail billing and request that type of service, knowing that he is going to get truck service for it?

[fol. 437] A. Mr. Examiner, it's the exception when he does instead of when he doesn't.

Q. When he does what?

A. When he ships it on a railroad billing.

Q. Do you mean to say that a habitual shipper, knowing that he is going to get the identical service on the identical equipment, is going to use a motor billing when he can get a lower rate on a rail billing?

A. The only answer I can give to that is in Joplin, Mo., and in Springfield, Mo., where, ever since we started the truck line, we have had substitute service for all the business that moves locally up to 100 or 150 miles out of those towns. And yet the Frisco Transportation Company gets as much or more business on its own billing than the Frisco Railroad gets on its. And at Joplin it's more. Now, they must be regular shippers. We don't have that many periodic shippers at Joplin.

Q. Maybe the Transportation solicitors are better than the Railroad solicitors.

A. Well, I can't give you an answer to it,—and I have solicited freight for 35 years!

By Mr. Damon:

Q. Mr. English, cite the instance of the strike at St. Louis.

A. Well, the same thing I have said applies to St. Louis even more. We had a truck strike there—

By Mr. Baumann:

Q. How many days did it last?

[fol. 438] A. It lasted 2 weeks. You would hear all kinds of complaints from shippers; the fact that you didn't have truck service available. And we attempted to handle that. It's true it was congested on account of the enormous volume of business that was dumped on the railroad during that strike.

By Exam. Croft:

Q. Do you mean that despite the strike you did have available motor auxiliary service?

A. Rail service.

Q. Rail service only?

A. We had an enormous increase in our rail business.

Q. But it had to move all rail?

A. It had to move all rail. And that business went back; that is, our share of it. I am not speaking for other truck lines; I think the same thing happened to them, but I can't say. With us we went right back to where we were after the strike was over. Those very same shippers, realizing— They must have realized they were getting a lower rate. But I think the service that was given there under that congested condition was so poor that they elected to pay the difference in rate. I don't know of any other explanation.

Q. But that difference in service wouldn't prevail except where you had an unusual thing like that?

A. That's true.

Exam. Croft: I have nothing more on the subject at the moment. I may have to come back to it. Someone else may have something.

[fol. 439] By Mr. Earnshaw:

Q. How many stations does the applicant have, Mr. English?

A. Oh, about 250, I would say.

Q. And you named some eight points where the railroad and the Transportation Company have separate stations. Now, may we assume that the rest of those 200 are joint rail-Transportation Company stations?

A. No. At least 100 of them, more than 100 of them, are off the railroad; highway points. Now, with respect to the others, they are joint.

By Exam. Croft:

Q. That would leave around 90 possibly; 90 to 100?

A. Ninety to one hundred stations on the railroad that are joint.

By Mr. Earnshaw:

Q. And at those points the agent would be a joint employee of both companies?

A. The agent is a joint employee of both companies, represents both companies.

Q. Now, yesterday with Mr. Essex we were discussing the matter of individuals who are employees of both the traffic department of the railroad and of the Transportation Company. I don't want to repeat what we went over yesterday; but it is true, isn't it, that there are a number of individuals who perform traffic supervisory functions for both companies?

[fol. 440] A. Well, no, not very much of a number. There are three men who are paid or carried on the Frisco Railroad pay roll on account of their seniority and pension rights and things of that kind, and the Frisco Railroad bills the Frisco Transportation Company for 100 percent of their salary and expenses.

Now, my salary is paid jointly— On account of having the two positions I am paid— About 60 percent of my salary comes from the Frisco Transportation Company and 40 percent of it from the railroad, which was as near a division of my time and expense as we could reasonably figure out.

Q. Well, do those three other individuals that you referred to have duties in connection with both companies?

A. Nothing other than to consult with Mr. Gleaves there and other operating people in connection with what the Railroad Company wants in the way of substitute service.

Q. Don't they have a general— I am afraid we had better identify these three people so we will know who we are talking about, if you don't mind.

A. Well, if you could tell me more of what Mr. Essex said or who he was talking about, I could explain the details, if I knew.

Mr. Damon: Off the record.

(Discussion off the record.)

A. Those men listed in that folder (exhibit 9-A) are all railroad men and have nothing to do, with the single ex-
[441] ception of myself— I haven't looked at the folder— I may be mistaken—but I am the only man in that folder who has any joint connection and gets joint pay for which there is no recovery on the part of the railroad.

Exam. Croft: We will take a short recess at this time.

(Short recess.)

By Mr. Earnshaw:

Q. Mr. English, when you were referring to these three or four individuals who are paid by the railroad for certain services and the railroad is then reimbursed by the Transportation Company, you weren't referring to the president, were you?

A. No, sir.

Q. Mr. Thompson is the president of the company and the trustee of the railroad?

A. He is president of the Frisco Transportation Company and trustee of the Frisco Railroad.

Q. And part of his responsibility as president of the Frisco Transportation Company is to be responsible for its operations generally?

A. That's correct.

Q. And that would apply to certain other officers of the company?

A. That's right.

Q. Those are the officers who serve in an executive and supervisory capacity?

[fol. 442] A. Most of them are on the board of directors.

Mr. Earnshaw: That's all my questions for the present, Mr. Examiner.

Exam. Croft: Mr. La Tourette?

Mr. La Tourette: Yes.

By Mr. La Tourette:

Q. Mr. English, I would like to discuss with you the particular types of service performed by the Frisco Transportation Company, and I will attempt to describe them and then ask you to either confirm or deny that those are the types.

First, does the Transportation Company handle freight by an exclusive motor haul, which freight is received on a rail bill of lading, billed on a rail waybill, and which moves at rail rates?

A. It does whenever it is offered to them; yes, sir.

Q. Does the Transportation Company engage in the transportation of freight received on motor bill of lading, billed on motor billing, and at motor rates?

A. It does.

Q. Does it engage in the transportation of freight, rail freight, which moves at rail rates from a rail break-bulk point to ultimate destination or from origin point to a rail break-bulk point?

A. It does; yes, sir.

Q. Now, does the Frisco Railway transport freight for [fol. 443] the Frisco Transportation Company, which freight is received by the Frisco Transportation Company on a motor bill of lading, billed at motor rates, and on motor billing?

A. It does, yes.

Mr. Damon: Just a moment. I don't think he understood that question. Let's have that question repeated, please.

(Last question read.)

By Mr. Damon:

Q. Does the railroad move freight for the Transportation Company on motor billing?

A. Yes, sir.

By Mr. La Tourette:

Q. Now, I have described four types of operations, three of which are performed by the Transportation Company and one by the railway. Is there any other type of service that the Frisco Transportation Company performs that I haven't described here other than the pick-up-and-delivery service which you previously discussed?

A. No. No other type other than the pick-up and delivery.

Q. Now, let's assume a shipment which comes to a depot that is common to both the Transportation Company and the railway and the shipment is tendered on a rail bill of lading. Does the Railway exercise its discretion as to whether that shipment shall move by the rail line or by the motor line?

A. It exercises absolute discretion as to what to do with it.

Q. Now, in those cases the shipper has nothing to do with the manner of service that is performed in connection with the shipment?

[fol. 444] A. Not unless he exercises his tariff privilege of advising the Frisco Railroad that he does not want his shipments put on a truck, given truck service.

Q. Now, is the same true with respect to a shipment that's tendered on a motor-carrier bill of lading where the actual physical transportation is done by the Frisco Railway?

A. Yes, sir.

Q. Can you tell us the percentage of the total freight handled by the Transportation Company which is freight moving in substituted service for the Frisco Railway?

A. The percentage of the haul?

Q. Yes.

A. Well, I have the figures here by years. The total rail substitute-service freight ranges between 51 and 56 percent of the whole.

Q. Taking, then, the freight which is transported physically by the Frisco Transportation Company, 51 to 56 percent of that freight is freight which is moving in substituted service for the Frisco Railway. Is that right?

A. That's right.

Mr. Baumann: May I at this time make reference to exhibit 5-A, put in by Mr. Essex, containing the tonnages?

Mr. La Tourette: Does that show that picture, Mr. Baumann?

Mr. Baumann: Yes, sir; exhibit 5-A.

[fol. 445] Mr. La Tourette: I see. Thank you.

By Mr. La Tourette:

Q. Generally speaking, is it true that the trucks represented by exhibit 5-A or, rather, the trucks which are engaging in the transportation of property handle both motor freight moving on a motor bill at motor rates as well as freight moving on a rail bill at rail rates?

A. I never saw exhibit 5-A.

Q. Well, disregarding 5-A and speaking particularly from the standpoint of operations as they are conducted.

A. Yes, sir; that's true.

Q. You mentioned that at certain stations there are joint employees. You mentioned particularly agents who

might act in a joint capacity at a particular station for the railroad and the Frisco Transportation Company. Do you recall that? A. Yes, sir.

Q. Now, is it part of the duty of those agents to solicit traffic for the railroad or the Transportation Company?

A. No, not directly. Their duties are strictly— They belong to the operating department, and their duties, of course, are first to the operating department. If they want to do it they can elect to, but there is no way to force them to.

Q. Well, don't those agents attempt to secure as much business as they can where competition is present?

A. Yes, where competitive conditions make it—

Q. Well, how do the agents determine whether they shall [fol. 446] attempt to influence the business to the Frisco Railway or whether they shall attempt to influence it to the Frisco Transportation Company?

A. Well, I have never seen any of them in action and never have had any reports on what they have done, Mr. La Tourette; so really I couldn't say how they do it or if they do it, I am assuming they do.

Q. But you don't know whether, in their solicitation, they would favor the Frisco Railway or the Frisco Transportation Company?

A. Oh, well, I am assuming most emphatically they would favor the railroad company.

Q. I see. They would solicit freight for the railway against its subsidiary, the Frisco Transportation Company, is that it?

A. Oh, I think if they solicited freight at all they would solicit, first of all, for the railroad. As an actual matter of fact, Mr. La Tourette, there is really very little of that done except at just certain points.

Q. I see. Well, they are joint employees, are they not?

A. That's correct. They are.

Q. But you think they favor one of the joint employers against the other joint employer?

A. Well, they have always been an employee of the Frisco Railroad, and that's where they themselves—their orders are given to them. We never give them any orders [fol. 447] except in a controversy with respect to a collection or something like that.

Q. Well, don't they receive orders from the Transportation Company with respect to their part in the conduct of the business of that company?

A. Well, as a rule, only in connection with some new movement or special movement or in connection with a claim settlement or something of that kind.

Q. Does the Frisco Transportation Company have a policy with respect to the maximum distance which it will transport a shipment by motor vehicle independent of any rail haul?

A. No, sir. The only policy it has is to tariffs, and it hauls just as far as the line runs.

Q. In other words, as I understand it, then, the Frisco Transportation Company would engage in a motor haul unrelated to any rail transportation from St. Louis to Dallas, Tex.?

A. It does do it every day; yes, sir.

Q. It does it every day, is that it?

A. Yes.

Q. And would it also engage in exclusive motor hauls from Kansas City to Memphis, Tenn.?

A. Yes; in case business is offered, it does.

Q. In other words, it has no limitations upon its operations as a motor carrier in the transportation of property which has no relation to a rail haul or hasn't received a rail haul?

A. It couldn't have under its tariff.

[fol. 448] Q. Well, it could substitute, couldn't it?

A. Well, yes, and it does occasionally substitute; yes, sir. But I mean it accepts freight on its own billing and its own rates.

Q. But your statement is that in its actual physical operations it does, in fact, perform an exclusive motor haul unrelated to any rail transportation for distances as great as that from St. Louis to Dallas?

A. Sir, it does both. It hauls all the way on the truck, and it substitutes on the railroad.

Q. And it would perform such exclusive motor-carrier service unrelated to a rail haul between any two points where it is authorized to engage in motor-carrier operations?

A. That's correct. Or accept interline freight from any connecting carrier.

Q. So in the case of the St. Louis-Dallas movement, then, the Transportation Company would, and does, directly compete with the railroad between St. Louis and Dallas?

A. Well, I am not going to say it competes with them. I am telling you what it does. We handle the freight that's offered us.

Q. You mean that it is not a competing transportation system with the Frisco Railway between St. Louis and Dallas?

Mr. Baumann: Mr. Examiner, in connection with the question of competition, I think that's a matter similar to [fol. 449] the question raised about a subsidy. It requires certain conclusions and arguments, and I don't believe this witness should be asked to draw those.

By Mr. La Tourette:

Q. I will put it this way, Mr. English: Have you issued instructions to the representatives of the Frisco Transportation Company that they shall not engage in any physical operations between points that are competitive wth the Frisco Railway?

A. I have issued no instructions to any Frisco Transportation Company employees not to solicit freight that's to be handled between points, both of which are on the Frisco Railway and the Frisco Transportation Company.

Q. So there is competitive solicitation, then, as between the Transportation Company and the railroad?

A. There is solicitation by both, Mr. La Tourette.

Exam. Croft: Mr. La Tourette, don't argue with the witness, please. It is perfectly obvious what the situation is, and I think we can all draw our own conclusions.

Mr. La Tourette: Very well. I think that's all I have.

By Mr. Earnshaw:

Q. Referring to exhibit 5-A, which sets up tons of revenue freight handled, Mr. English, could you tell us,

under the column "Exclusive Truck," how much of that tonnage represents truckload tonnage as opposed to less than truckload?

A. Well, I would have to guess at it. We do keep figures, [fol. 450] of course, of that. My guess would be about 10 percent. I can furnish you the exact figures.

Mr. Earnshaw: I think it would be interesting to have the complete picture there, Mr. Examiner, if that could be filed as a late-filed exhibit.

The Witness: You mean, now, the freight moving on a truckload-rate basis? Is that what you are talking about?

Mr. Earnshaw: Yes, sir.

Exam. Croft: Well, what's the significance of it, Mr. Earnshaw? I don't want to unduly burden—

Mr. Baumann: We are willing to furnish it.

Mr. Earnshaw: In the event that there should appear to be a trend to an increasing proportion of truckload freight on the part of the applicant—

Exam. Croft: Very well. I understand that the applicant is willing to furnish it.

Mr. Earnshaw: —it would be very significant.

Mr. Baumann: If it is available, I have no objection whatever.

Exam. Croft: A break-down of the figures in the "Exclusive Truck" column as between l. t. l. and t. l. traffic, so far as they are available.

(The document described to be furnished by applicant.)

Exam. Croft: Mr. Earnshaw, do you have anything further?

Mr. Earnshaw: No.

[fol. 451] By Mr. Reeder:

Q. Mr. English, isn't it a fact that in the Righter case to which you referred—that's the Righter purchase case, your finance case, to which you referred on direct testimony as being pending—that your company has adopted the position, as a matter of policy, that you will not consummate that purchase if it is authorized subject to restrictions, and that you have so advised the Commission on that?

Mr. Baumann: Mr. Examiner, I think he is going to an entirely different case and proceeding.

Exam. Croft: What's the relevancy of the question, Mr. Reeder?

Mr. Reeder: I would follow that up, Mr. Examiner, by asking him if the same thing isn't true in the Mo.-Ark. Transportation case. He has testified they wouldn't accept the rights in the Sub 15 case with restrictions on, and I think it would follow that I might fairly ask him if restrictions are put on the operating rights on the rest of their system, as a result of these proceedings or any other proceedings, they would go out of the motor-carrier business.

Mr. Baumann: That's drawing an illogical conclusion from anything that might have been said in those other cases. I submit it has no relevancy. First of all, they are cases now pending before the Commission and should be decided upon those records, and the relevancy of that testimony is not in issue for the reason that we are only [fol. 452] here concerned with five or six subnumbers, and it has no pertinency whatever under any issue here.

Exam. Croft: I think the objection is good, Mr. Reeder, and I sustain it.

By Mr. Reeder:

Q. Mr. English, you, of course, heard this colloquy. Suppose the restrictions are imposed in the proceedings of which your testimony here is a part. What will be the action of your company? Will you operate under those restrictions?

Mr. Baumann: I desire to raise an objection to that because that's in the nature of prophecy and prognostication, of which no man capable of reasoning is capable of answering what may or may not occur. It's based on two presumptions. First, that the Commission is going to restrict them legally and be able to do it. Secondly, what we may be able to do in the future and perhaps at a time when Mr. English has retired to a well-earned rest.

Exam. Croft: Well, I have in mind a question that may be agreeable to you and satisfy your purpose also.

By Exam. Croft:

Q. I observe from exhibit 5-A that in 1942 your total traffic was approximately the same as your joint rail-motor traffic was in 1945. Is there any reason why you couldn't continue to operate successfully handling only that volume of traffic?

I will say in that connection it has been indicated—[fol. 453] I think you said something to that effect yourself—that you needed the all-motor service to make the operation successful. Now, having in mind that your motor-rail service now is equal to your total traffic after 6 or 7 years of operation, is there any reason why you couldn't operate now on that traffic alone?

A. Well, I don't know what you would mean by "operate successfully."

Q. Didn't you operate successfully in 1941, 1942?

A. From a profit standpoint we did. But our expense of operation today is about 60 percent higher than it was in 1941, and what we did then in the way of "getting by" with light loads and still meet our expenses cannot be done today.

Q. Is there any operating obstacle that would prevent you from making an appropriate reduction in your plant or allowing it to recede to a point where it would be substantially the same as it was in 1942 and operate as you did at that time?

A. Yes, there is.

Q. What is it?

A. We have much more mileage than we had then. We are forced to give the railroad the kind of service that we have always attempted to give them and that they demand, which entails a service that we can't expect to fill trucks with with nothing but rail freight.

Q. How many miles of nonrail routes are you now operating?

A. Nonrail?

[fol. 454] Q. That is, routes not paralleling the railroad.

A. Oh, say, 125 or 130 miles probably, out of 5,000, interstate.

Q. Have you any information as to your average load factor at present?

A. Yes, sir.

Exam. Croft: Is that in the record, does anybody know?

Mr. Earnshaw: No, it isn't.

I think I have the last monthly report that I believe has that in it.

Well, I find I am mistaken about that.

By Exam. Croft:

Q. What has been your increase in route-miles since 1942? Approximately.

A. Well, some place between 800 and 1,000 miles.

Q. About one-fourth of what you had previously, before that?

A. Before that.

Exam. Croft: I think I will let you go ahead for a minute, Mr. Reeder. I have some more questions. I didn't want to take the witness away from you.

Mr. Reeder: Thank you, Your Honor. I appreciate it.

By Mr. Reeder:

Q. Mr. English, why is it you use Smith between Monett and Seligman when your own trucks are also operating over that route?

A. The railroad has such a small amount of business in between there that the railroad can't afford to do it. Mr. Smith is operating in that territory and, like us, he [fol. 455] had light tonnage, and we hired him to do it.

Q. This cotton: You say that moves on a pounding-in-transit rate?

A. No. It is a transit rate under which—

Q. I meant compressing in transit.

A. —in which we carry a float-in rate to the compress; and when the cotton moves out of the compress to the ultimate destination the charges are made back to the original point of origin on each shipment.

Q. Now, does the Frisco Transportation Company move the cotton all the way from origin to destination, including the stop at the compressing station?

A. No, sir. No. Just the service to the point of compression. From point of origin to point of compression.

Q. That is not intrastate, is it?

A. No, sir. It's interstate traffic.

Q. How often does the Frisco Transportation Company make settlements with the independent motor carriers with whom it interlines all-motor freight?

A. Once a month.

Q. What about with carriers like Smith? Are they settled with by the railroad or by the Frisco Transportation Company?

A. By the railroad.

Q. Is that true of the other substitute-service motor carriers whom you mentioned?

[fol. 456] A. Every month.

Q. And are all those settlements made once a month?

A. Yes, sir. Like ours, about 30 days behind. But once a month.

Q. You testified by inference that there was some business that a solicitor might run across which the Frisco Transportation Company might not be interested in but the railroad would be and vice versa. Now, what business would it be that the railroad might be interested in and the Frisco Transportation Company not? And I mean aside from very heavy commodities, commodities in bulk, and carload-lot shipments.

A. Oh, there's a great deal of it. Of course, we have more than heavy shipments; we don't mind those. But odd-sized shipments and bulky shipments, balloon freight, and where our tonnage is so much one way we are not justified in moving it in one direction where we know we will have an empty haul back in the other. There is quite a substantial volume of that kind of freight.

Q. Do I understand your testimony to be that at times the solicitors for the railroad and the solicitors for the truck line call on the same shippers in the same towns for shipments moving to the same destinations?

A. I don't know, but I think that could happen. Most railroad solicitors solicit carload freight, in which we have no interest. Very few of our shippers, except incidentally what the railroad soliciting force solicits, ship l. c. l. rail-

[fol. 457] road freight.

Q. Where an incident of that character would happen, however, whose interest would predominate? That of the Transportation Company or that of the railroad?

A. Well, if each one of them went there, I presume the best man would win. I couldn't tell. It's a matter of individuality, I expect.

Q. When a shipper sends freight down to the Frisco Transportation Company doesn't he get an allowance of 5 cents a hundred, the same as the shipper sending freight down to the railroad gets?

A. No, sir. There are certain exceptions only.

Q. Where are the exceptions?

A. Kansas City and Springfield and St. Louis.

Q. But at all rail points the shipper gets an allowance?

A. That's right.

Q. Now, in addition to payments for substituted service, for what other purposes, or in payment for what services, would money pass from the railroad to the Frisco Transportation Company in the usual and ordinary course of your business?

A. Well, there's none that I know of. There's an offset arrangement each month with respect to the rental on all the buildings we use. The Frisco Transportation Company pays rental on about approximately 200 stations for the amount of space they use.

[fol. 458] Q. Does that include those separate freight houses you mentioned?

A. Where it is railroad property, yes.

Q. At those nine cities?

A. Yes. And at every little station on the railroad.

Now, when the railroad gives the Transportation Company credit for the amount of earnings they have had during that month they deduct charges against the Frisco Transportation Company, and we get the net money.

Q. And one of those charges is rent of real property, isn't it, of all these stations?

A. Yes.

Q. And separate freight terminals you mentioned?

A. Yes, sir.

Q. All right. What's another charge?

A. Labor charge.

Q. What labor?

A. Once a year, as a rule—and the railroad has followed it very consistently—the accounting department of the Frisco Railroad has made a study of the services the railroad performs for the Transportation Company in the way of labor—not rentals but labor—and they adjust a monthly charge against the Transportation Company to cover the out-of-pocket cost of the Frisco Railroad in connection with that labor. That is for the claim department and the accounting department and the legal department. [fol. 459] Q. And that figure is fixed by the railroad's accountants?

A. Yes, it is fixed by them; that is, subject to my approval and scrapping with them about it! I always think it's too much, of course; but they fix it, and generally that's what it is, too.

By Exam. Croft:

Q. How about employees at these smaller stations who probably render service for both companies?

A. They are included— They make a survey. It is an estimate, but anybody that does anything for the Frisco Transportation Company and is on the Frisco Railroad pay-roll is asked to give an estimate of the amount of time they have devoted to any kind of service whatever for the Frisco Transportation Company.

Q. Now, did I understand you to say that they are asked to give an estimate or is a survey made by someone else?

A. Well, a survey is made or they are asked by the accounting department of the Frisco Railroad. They make the completed survey.

Q. Well, how meticulous is that survey?

A. I couldn't say.

Q. What I am trying to get at is, Do you end up with anything more than an estimate?

A. Well, it's bound to be, it will have to be, an estimate since there are no pay-roll records. And there is no way [fol. 460] of knowing, for instance, when an agent is paid by the month and will perform some duties for the Frisco Transportation Company, and he wouldn't have been do-

ing anything if it hadn't been for that, still his time is put in there against the Frisco Transportation Company. So it is an estimate. In the nature of it, it has to be.

By Mr. Baumann:

Q. In other words, the agent doesn't keep a time-clock check over the services he performs for one or the other?

A. No.

Q. What he does, when the survey is made he tells the accounting department, "I spent about so much time on Frisco Transportation Company business"?

A. Yes.

By Exam. Croft:

Q. Well, do I understand he makes this estimate each month?

A. No, sir; each year.

Q. A survey is made each year?

A. Yes, sir.

Q. And then each month's check or salary is allocated on the basis of that?

A. Yes, sir.

By Mr. Reeder:

Q. Well, I understand, then, that these agents work back and forth. At any given time during the day they may be working for either the Railroad Company or the [fol. 461] Transportation Company, depending on what problem has arisen or what needs to be done?

A. They take care of the business of the two companies jointly.

Q. As though it was one as far as they are concerned?

A. That's right.

Q. Now, of course, you have passing between the railroad and the Frisco Transportation Company debits or credits for pick-up-and-delivery service at I believe the 24 points where you said you did the pick-up and delivery.

A. No, 23 points where we perform pick-up and delivery for the railroad.

Q. They pay you for that?

A. Yes. That's the same way. We make a contract at so much a hundred, just like with any other pick-up.

Q. How much a hundred?

A. It ranges all the way from 6 cents to 20 cents.

By Exam. Croft:

Q. Is it the same rate as paid independent carriers in similar locations?

A. Yes, sir.

By Mr. Baumann:

Q. And is it on the same contract form?

A. Exactly the same contract we use with everybody else. And ordinarily we have taken over the old contract just as it is, the previous contract.

By Mr. Reeder:

Q. At the same time your pick-up-and-delivery trucks are picking up for the railroad at those 23 points you [fol. 462] picking up for the Transportation Company?

A. Yes, that's right.

Q. Now, at some of those points a shipper using your service would get a 5-cent allowance on a shipment you were picking up for the railroad, but the shipper next door who is shipping by truck wouldn't get that allowance, would he?

A. No, sir; that isn't the way it works. The shipper has to take his own shipment to the railroad if he gets a 5-cent allowance. If he gives it to the pick-up-and-delivery man he doesn't get anything. If he takes it to the railroad himself he gets a nickel.

Q. If he gives it to a pick-up-and-delivery man, the pick-up-and-delivery man gets the nickel. Is that the way it works?

A. Well, he gets whatever the charge is for the picking up, yes. It's different in every town, a different price. Very few of them are a nickel any more; most of them are a dime.

Q. Now, for what other services would credits pass between the railroad and the Transportation Company?

A. Well, one of the biggest single items of credit they would get is, of course, the payment for cotton. That's on a different basis than anything else. That amounts to $25,000 or $30,000 per month frequently for hauling cotton.

By Mr. Baumann:

Q. For what period?

A. For about a 6-months' period each year.

By Mr. Reeder:

Q. That's this transit cotton you are talking about?

[fol. 463] A. Yes, sir.

Q. All right. Now, go ahead. What other items?

A. Well, we lease to the railroad equipment they use to haul section crews in and signal corps men and things like that. That's another item, a substantial item.

Q. Busses?

A. No. These are trucks that we have built with seats in them and fixed them up to handle tools, track tools, and things like that. We have, oh, from 20 to 50 of those under lease to the railroad all the time. They call on us whenever they want a truck for that kind of service. And we are presumed to have it ready for them.

Now, of course, the same general rule applies to our bus line as applies to our truck line. We handle mail for the railroad.

Exam. Croft: Let's leave the bus line out. We are not interested in that.

By Mr. Reeder:

Q. What other items are there for which credits change hands between the railroad and the Transportation Company?

A. I don't know of any others.

Q. You have named everything that you can think of?

A. As far as I can recall.

Q. In answering an inquiry by the Examiner a few [fol. 464] moments ago, you said there had been an increase in costs of 60 percent since 1941. Did you intend to say a 60-percent increase in costs?

A. Yes; approximately that. I might have to go back a little bit farther than 1941; but in 1939 our cost per mile of operating a truck line, operating truck service, was 19½ cents a mile for every truck we ran. Last year it was 39¾ cents per mile for every truck we ran. Now, I can't remember the exact date when that early figure was effective, but it was either 1940 or 1939; I don't know which. But I think I am perfectly safe in saying that the cost per mile for operation has increased some place around—certainly more than 50 percent.

Q. Are you able to say whether those cents-per-mile figures you have given in each instance include all of your costs?

A. Yes, sir.

Q. Fixed overhead costs and everything?

A. Yes, sir; overhead and everything.

Q. At what rate per mile or per hundred pounds do you charge the railroad for transporting traffic in substituted service?

A. Well, that varies. We charge them by the hundred pounds for everything but the cotton that we move for them. The present rate is 50 cents a hundred.

By Exam. Croft:

Q. For what distance?

A. I couldn't tell you. 50 cents a hundred.

By Mr. Reeder:

Q. That's the rate you charge?

[fol. 465] A. Yes.

Q. Anywhere, any distance?

A. Anywhere, any time, any place.

Q. Any distance?

A. That's right.

Mr. Earnshaw: Might I interject and ask as of what date? because that's slightly different than the figure Mr. Essex gave us yesterday.

Mr. Baumann: Ten dollars a ton Mr. Essex said as of the 1st of January.

By Mr. Earnshaw:

Q. That's since the 1st of January?
A. Yes.

Mr. Baumann: Nine dollars prior to that.

By Mr. Reeder:

Q. What is the rate on the cotton?
A. That's the float-in rate that the railroad charges the shipper for the local service from the station to the compress. And we do all the work, and they give us all the revenue. That's a very low rate. That's about 10 or 11 cents a hundred. The hauls, however, are short.

By Mr. La Tourette:

Q. In other words, on the cotton the Transportation Company receives the equivalent of the local rate from the origin point of the cotton to the gin?

Exam. Croft: The compress.

By Mr. La Tourette:

Q. Or to the compress.
A. Yes, to the compress.
[fol. 466] And, as near as we can figure it, that's the way the service works out on the l. c. l., too.

By Mr. Reeder:

Q. Do I understand it to be your testimony that each of your trucks on each of those runs will have some railroad freight which is moving in coordinated or substituted service on it?
A. No. Oh, no. We run a number of trucks handling our own service, especially the truckload business, which is strictly F. T. C. business. But on nearly all of the local trucks that we run they have both truck freight and rail freight on them.
Q. And I believe you testified the proportion would be 51 to 56 percent rail freight?
A. That's right.

Mr. Baumann: That's the total tonnage handled; one or the other.

By Mr. Reeder:

Q. But that will apply on down to the individual vehicle?

Mr. Baumann: It will not apply down to the individual vehicle.

By Mr. Reeder:

Q. Well, what does the witness say about that?

By Mr. Baumann:

Q. Well, will it apply to individual vehicles?

Mr. Reeder: Well, I am asking him.

A. No, not unless you combine them into the total operation. We have dozens of trucks that handle nothing but [fol. 467] rail freight. We have others that handle nothing but F. T. C. freight. Then all of the truckload business is strictly truck freight on truck billing. When you combine all those the total movement handled for the year is around 50 to 56 percent of rail freight and truck freight.

By Exam. Croft:

Q. If you eliminated the truckload or motor freight, the ratio of rail freight to the total would be much higher than 50 to 56 percent, wouldn't it?

A. Yes, it would be considerably higher because 8 or 10 percent of our total—I am guessing—is truckload business.

By Mr. Reeder:

Q. The thing I was particularly interested in, Mr. English, was as to your trucks which have—that is, the local trucks which you described that have both truck and rail freight on them—what proportion of the freight on them normally, as an average, will be rail freight and what proportion will be truck freight?

A. I think that proportion on the average would run probably a little bit more than the figures I have given you after you have eliminated the straight truckload business you handle.

Q. It might be 60 to 65 percent?

A. Oh, no, it couldn't be that high.

Q. What is your best judgment as to what it would be, Mr. English?

Mr. Baumann: I don't think the witness has the question right. Are you taking this 55 to 40 percent and [fol. 468] applying it to a single vehicle in normal operations? Is that what you are trying to do?

Mr. Reeder: Am I trying to?

Mr. Baumann: Is that what your question conveys?

Mr. Reeder: No; I am not trying to do anything but find out the facts.

Mr. Baumann: I don't believe the witness has got the question yet, because it is a little bit illogical to me and to him, too.

Mr. Reeder: Speak for yourself.

By Mr. Reeder:

Q. Do you understand my question, Mr. English?

A. Well, I understand your question. But, of course, it would just be impossible for me to answer it in the way you put it. We don't make any check at all of individual trucks as to what proportion of freight there is in any one truck on of any one operation.

By Exam. Croft:

Q. Take the average individual truck. It will be the same as the total, won't it?

Mr. Reeder: Well, he has already answered the question and said that it was and gave the percentage.

By Mr. Reeder:

Q. Now, if you wish to change your answer or you feel now that you were mistaken, Mr. English, why, proceed

to change it because I certainly didn't want you to misunderstand.

A. The only difference I see in it is to determine with [fol. 469] your local l. c. l. and l. t. l. freight, to determine what that was. You would have to eliminate your truckload freight if you are assuming you are going out of the truck business. That would change these figures for the total for a year just slightly but not very much.

Now, to say that any truck you go out here and see operating on the highway had 51 percent of rail freight and 49 percent of truck freight in it, of course, that just wouldn't work at all because it may be full of rail freight or it may be full of truck freight. But when it gets around to the average of the total movement, why, there's the total tonnage and the percentages. That's just about all I can say about it.

Mr. Reeder: I think that's plain enough. Thank you very much. I have no other questions.

Exam. Croft: I have just one subject I want to explore a little bit.

By Exam. Croft:

Q. To what extent does the Transportation Company draw supplies from any pool maintained and purchased by the railroad?

A. None whatever.

Q. There was testimony yesterday to some extent that you obtained some of your supplies from the railroad.

A. Well, there might be certain little things that we buy from them that they keep in stock.

Q. What I am trying to do is to explore the possibility [fol. 470] of your obtaining a benefit there by reason of the purchasing facilities of the railroad.

A. The purchasing department of the Frisco Railroad is the purchasing department of the Frisco Transportation Company. We have our own storekeeper. We buy our own gasoline, we buy our own oil, we buy our own equipment, we buy our own repair parts, we buy our own stationery.

Q. You buy them through the purchasing department of the railroad?

A. Yes, sir.

Q. And how are the prices arrived at?

A. It's the price plus 15 percent store charges. Just like the railroad took it out.

Q. Is that what the railroad charges for bookkeeping purposes?

A. Yes.

Q. And the bookkeeping department is supposed to operate on that 15 percent?

A. Yes, sir.

Q. By reason of the purchasing power of the railroad, do you get a better price on many of your items than some of the other motor carriers?

A. Sometimes I think we do, and sometimes I don't think we do. On some items we do, and on other items we don't at all. And once in awhile I think that 15 percent is far more than represents the price that we would pay if [fol. 471] we went out and bought it ourselves. I think our own purchasing power helps us, of course, in buying equipment.

Exam. Croft: We can't hold that against you!

I have nothing further.

Mr. La Tourette: May I be indulged in just one more question?

By Mr. La Tourette:

Q. Mr. English, does the Frisco Transportation Company engage in this type of operation? Assume a shipment tendered as a carload shipment on a rail bill of lading, to move on rail billing at rail rates. Does the Transportation Company in substituted service transport such traffic for the railway?

A. It does not.

Q. It has not?

A. No, sir; not to my knowledge or not with my permission.

Mr. La Tourette: That's all.

Exam. Croft: I think that's all the cross-examination, Mr. Baumann.

Redirect examination.

By Mr. Baumann:

Q. Mr. English, for clarification, reference was made to the payment made by the railway to the Transportation Company for performance of substitute service. That charge is based on cents per hundred pounds and is covered by what kind of a document?

A. Well, that's a division basis, covered by a division [fol. 472] sheet, issued by the traffic department of the railroad.

Q. Jointly with the F. T. C.?

A. That's right.

Q. Now, how did you happen to establish that type of a basis of divisions?

A. Well, it grew out of the fact that at the beginning of our operation both the railroad and the truck line agreed we would charge the local rates to the railroad for all the service. We hadn't operated very long until we found that that was a perfectly unnecessary lot of expense to check every bill. The accounting department would have to check and recheck after we had once checked them in order to determine how much they owed us.

So we reached an agreement with the railroad that we would establish a divisional basis. And we made a study at that time of what an average of everything we handled, regardless of distance, would amount to. And it brought it down to an average rate which was, as I recall, about 30 cents when the line was very short.

And nearly every year since then, and sometimes twice a year, as the conditions have changed, we have made a further study of it and, generally speaking, brought that up a little to conform to the increased cost of operation and the increased distance we have hauled rail freight.

Q. So it still today represents an average?

[fol. 473] A. It still represents an average, and it is still on a divisional basis with the railroad.

Q. Now, reference was made to the supervision by Mr. Thompson, Mr. Worman, Mr. Coulter, and Mr. Roberts in connection with the operations of the Frisco Trans-

portation Company. Is that a direct supervision or how does it act?

A. No, sir. They constitute the board of directors, and they have a meeting once a month or every 3 or 4 months, and there is no charge by them for that kind of service at all. They consider the conditions of the company, receive reports by themselves and others, and either approve or disapprove what we have done or expect to do.

Q. The management or operation of the Frisco Transportation Company is centered in yourself, is it not, in effect?

A. Subject to that overhead supervision; yes, sir.

Q. Now, let me ask you one other question. Does the Frisco Transportation Company have separate forms of bills of lading separate from the railroad?

A. Oh, yes, sure.

Q. And these agents have them?

A. Yes, sir; every agent has them.

Q. Does the billing of the shipment control the movement in accordance with the carrier's tariffs?

A. It does; yes, sir.

Q. Now, who pays the agent at the local station? Is he [fol. 474] paid by the railroad or the Transportation Company direct?

A. Paid by the railroad.

Q. From whom does he get his pay check from the railroad?

A. Well, through the accounting department.

Q. Does the Frisco Transportation Company also have extensive intrastate operating rights?

A. Yes, sir.

Q. Do they generally run—

A. Coextensive, generally speaking, and in some territory where we have intrastate where we have no interstate.

Q. Are there any restrictions on these intrastate rights?

A. No, sir; none whatever.

Q. And the tonnage, of course, represents both types of freight that you speak of?

A. Yes. Those tonnage figures represent all of it, both interstate and intrastate.

By Mr. Earnshaw:

Q. Does the division share cover both kinds of freight?
A. Yes, it covers both kinds.

By Mr. La Tourette:

Q. Mr. English, when you said the billing controls the movement, you didn't mean by the mere fact that a rail bill of lading was issued that that was an indication that the shipment was going to move by rail?

A. No. It controls the movement with respect to the entire movement. That is, it controls the rate, and it controls [fol. 475] it going back to the railroad.

Q. It controls the transportation and moves under the applicable tariff?

A. Well, subject to the election of the railroad to move part of the haul in substitute service.

Q. Or all of it?

A. Yes, sir.

Exam. Croft: Does that conclude your redirect?

By Mr. Baumann:

Q. Have you anything else to add you think of?
A. No; not unless there are some more questions.

Mr. Baumann: That is all.

Mr. Earnshaw: Mr. Examiner, you have been very indulgent with me, but I have four more questions.

Recross-examination.

By Mr. Earnshaw:

Q. In readjusting your divisions, how do you determine the increased cost and the increased mileage? I tried to get that of Mr. Essex yesterday. He didn't give me what basis you use.

A. We do have each month a statement of the average mileage or of the average haul on everything we move. So we know each month and from year to year whether it is going up or down. We only had 60 miles of truck line

when we started. Naturally the mileage increases as you purchase new lines.

Q. What's the minimum charge on that 50 cents a hundred?

[fol. 476] A. There is no minimum. It's 50 cents whether it moves 10 miles or a thousand.

Q. Has that always been true?

A. Yes. That arrangement. Not that price but that arrangement.

Q. The costs per mile that you refer to don't include interest on investment, do they?

A. No.

Q. Has the Frisco Transportation Company paid any dividends to the railroad?

A. No, sir.

Q. Have you made any cost study to determine whether or not the rates paid by the railroad to the Transportation Company fully compensate the latter for the service performed?

A. No, I have made none. Mr. Gleaves testified as to a study of that kind that the railroad had made for the service as a whole. That is, if they had to do away with the truck line. He gave you the cost on it. $164,000 a month or something like that.

Q. That's the only study that's been made?

A. That's the only one that's been made.

Q. There is one final matter here.

Off the record, please.

(Discussion off the record.)

By Mr. Earnshaw:

Q. Mr. English, this is my last question. Are you fa-
[fol. 477] miliar with what the Railroad Commission of Texas provided in its order in docket 5712-R-T, the effect of which is to require railroad motor transport companies to apply motor rates to all movements of traffic such as that here in issue? I will add that counsel states that that is to take effect at present on April 15.

A. I read the amended order, but I have never seen the original order.

Q. (Handing document to witness.)
A. Is this the original or an amended?
Q. This is a supplemental order.

COLLOQUY BETWEEN COUNSEL AND EXAMINER

Mr. Baumann: Mr. Examiner, we have no objections to counsel for the A. T. A. putting in copies of the original and amended orders in that Texas Commission case, and we would welcome it.

Exam. Croft: I am toying with the thought of what relevancy they have here.

Mr. La Tourette: They refer to intrastate traffic. I don't see where it would have any concern in this proceeding.

Mr. Earnshaw: I will develop that, Mr. Examiner.

Exam. Croft: Do you want it marked for identification?

Mr. Baumann: We will have no objection to counsel making it his own exhibit and putting it in.

Exam. Croft: I believe that the next exhibit number is 17-A.

[fol. 478] Mr. La Tourette: Off the record.

(Discussion off the record.)

Mr. Earnshaw: We reserve the right to submit this, and we will not offer it physically at this time in accordance with Mr. Baumann's suggestion because I don't have both orders here at this time, anyway.

Mr. Baumann: Well, let's have this understanding: That either party may refer to that order in its brief and give pertinent portions thereto as an appendix if you wish it that way.

Mr. La Tourette: Now, I'll object to that, Mr. Examiner. I contend that this order of the Texas Commission has no relevancy to the issue here, and it deals with an entirely different subject-matter than we are dealing with, a different statute and everything else. And what the Texas Commission might do cannot in any way control the Interstate Commerce Commission.

Mr. Baumann: It might be a good indication of the trend in matters of this kind, and that seems to be something within the spirit of these proceedings. And I be-

lieve, under the rules, Mr. La Tourette, each side could reproduce it and attach it to their brief if they so desire. And if we feel like we want to use it we will have it authenticated.

Mr. La Tourette: Well, I contend it has no place in this record.

[fol. 479] Mr. Baumann: I want to call attention to the fact that a tender was made by the counsel for the American Trucking Associations and an exhibit number was assigned to it by the examiner.

Exam. Croft: I have been very liberal throughout the proceeding. I don't know of any relevancy, but if anyone wants to offer it now or if they want permission to offer complete copies—I understand there are two drafts of it or something of the kind—as a late-filed exhibit, I will grant that permission. But unless it is put in in that manner, I don't think it should be referred to as part of the record.

Mr. Baumann: You mean we wouldn't be able to reproduce parts in our briefs?

Exam. Croft: Well, if you do do that, I think you should provide a copy for the record in the usual manner.

(Discussion off the record.)

Mr. Baumann: If Frisco Transportation Company desires to place it in the record, we will do so within 15 days, with your permission.

Exam. Croft: Very well, now. Is that the original and supplement?

Mr. Baumann: Yes. If there is a supplement issued or any amendatory order issued, we will submit it within that period if we decide to put it in.

Exam. Croft: Very well.

[fol. 480] Mr. La Tourette: And we renew our objection, of course, to the receipt of that as a late-filed exhibit.

Exam. Croft: The objections are overruled.

(The documents described to be furnished by applicant.)

(Witness excused.)

Exam. Croft: Now, I think it is helpful at the end of a record to review the late-filed exhibits that are to be

put in. According to my notes, there was some revenue information, a break-down of the exclusive truck figures shown on exhibit 5-A, the order we have just been discussing, and, off the record, Mr. Baumann has agreed or indicated a willingness to supply a revised, corrected, and enlarged map. I have several suggestions as to that change. I don't think it is necessary to put them on the record, but I will give them to Mr. Baumann.

There remains the question of briefs.

Mr. Baumann: Mr. Examiner, before we go to the briefs, I would like to inquire whether there is any testimony on behalf of protestants in this case and have that in the record.

Exam. Croft: Considering they are all packed up, I took it for granted there was none!

Has anyone any testimony?

Mr. Le Tourette: I have no testimony to offer, Mr. Examiner.

Exam. Croft: Have any of the protestants or inter-
[fol. 481] veners anything to offer?

Let the record show no response.

Going back to the information to be furnished, I think we had better allow 15 days for it all rather than the usual 10 days.

I believe that brings us up to the brief date. And, in view of my own calendar, I am inclined to be a little liberal. This is the 9th of April. How about the end of May?

Mr. Baumann: Just a moment.

(Discussion off the record regarding brief date.)

Exam. Croft: Briefs will be due June 10, and if anyone finds it necessary to ask for an extension the request should be received by the Commission not less than a week before that date.

Mr. Earnshaw: Will there be a proposed report?

Exam. Croft: I think it is desirable. The issues involved are technical, they are principally legal issues, and I would be pleased to have your views on any conclusions I may be inclined to suggest.

Mr. Baumann: Mr. Examiner, I understand the reporter has some doubt on how he is going to call these

exhibits, whether he is going to call them "Applicant's Exhibit No. 1-A" or what. I think they should properly be "Certificant's Exhibits 1-A," and so forth, in that we hold the certificates. That distinguishes them from our status as applicant.

[fol. 482] Exam. Croft: I think he should be instructed, and I will instruct him, to designate them as "applicant's" exhibits. You were applicant in the original proceedings.

Mr. Damon: We have the right to object. We object to being termed "applicant" in this proceeding.

Exam. Croft: It will keep the record clear if we adhere to the former description.

Now, is there anything else?

If not, the hearing is closed.

(At 4:30 p. m., April 9, 1946, hearing closed.)

[fol. 483]

Exhibit No. 19
Witness

FRISCO TRANSPORTATION COMPANY
COMPARATIVE GENERAL BALANCE SHEET

	Dec. 31, 1938	Dec. 31, 1939	Dec. 31, 1940	Dec. 31, 1941	Dec. 31, 1942	Dec. 31, 1943	Dec. 31, 1944	Dec. 31, 1945
ASSETS								
Current Assets:								
Cash	$ 97,591.50	$ 98,199.50	$ 56,478.78	$ 106,648.92	$ 408,243.42	$ 266,874.62	$ 454,353.64	$ 218,546.05
Special Deposits	60.00	2,060.00	25.00	25.00	55.00	125.00	130.00	117.50
Notes Receivable	-	50.00	-	-	-	-	-	-
Accounts Receivable from Assoc.Companies-Net	4,448.46	-	26,804.81	30,513.83	42,565.79	66,241.24	97,955.26	101,412.39
Accounts Receivable-Agents and Operators	100.58	-	-	-	-	-	-	-
Accounts Receivable-Other	-	6,289.99	14,017.30	18,924.26	46,792.70	58,763.42	116,959.33	97,867.33
Subscribers to Capital Stock	-	-	25,000.00	-	-	-	-	-
Material and Supplies	60.00	-	3,045.14	13,572.19	9,312.98	24,554.12	13,685.25	25,837.99
Other Current Assets	-	98.95	11,078.11	11,927.60	14,500.35	28,805.14	83,890.02	40,742.06
Total Current Assets	102,260.54	106,698.44	136,449.14	181,611.80	521,470.24	445,363.54	766,973.50	484,523.32
Tangible Property:								
Carrier Operating Property	1,479.00	3,125.78	65,763.07	87,164.14	-	-	-	-
Less Reserve for Depreciation	-	282.11	6,998.89	20,436.84	-	-	-	-
Net Book Cost	1,479.00	2,843.67	58,764.18	66,727.30	-	-	-	-
Rolling Equipment	-	-	-	-	380,070.28	621,506.73	813,869.36	871,224.34
Less Reserve for Depreciation	-	-	-	-	65,665.61	158,686.39	293,011.36	372,934.26
Net Book Cost	-	-	-	-	314,404.67	462,820.34	520,858.00	498,290.08
All Other Tangible Property	-	-	-	-	10,714.17	13,048.20	15,710.98	23,062.89
Less Reserve for Depreciation	-	-	-	-	1,013.47	1,933.29	3,157.10	4,846.64
Net Book Cost	-	-	-	-	9,700.70	11,114.91	12,553.88	18,216.25
Total Tangible Property	1,479.00	2,843.67	58,764.18	66,727.30	324,105.37	473,935.25	533,411.88	516,506.33
Intangible Property:								
Organization,Franchises & Permits	5,001.35	4,065.72	4,262.14	2,351.60	3,078.59	3,078.59	3,078.59	3,078.59
Other Intangible Property	-	23,222.50	55,937.05	62,600.57	68,475.57	98,990.52	142,027.43	143,892.32
Less Reserve for Amortization	-	-	-	9,465.59	13,668.77	27,670.01	88,432.45	97,176.85
Net Book Cost	-	23,222.50	55,937.05	53,134.98	54,806.80	71,320.51	53,594.98	46,715.47
Total Intangible Property	5,001.35	27,288.22	60,199.19	55,486.58	57,885.39	74,399.10	56,673.57	49,794.06
Deferred Debits:								
Prepayments	687.39	2,919.06	6,360.62	6,417.54	33,070.69	16,915.22	12,849.96	19,758.09
Other Deferred Debits	-	5.42	89.20	4,194.44	12,903.83	8,682.62	39,530.47	13,289.29
Total Deferred Debits	687.39	2,924.48	6,449.82	10,611.98	45,974.52	25,597.84	52,380.43	33,047.38
Miscellaneous Debit Items:								
Commission and Expense on Capital Stock	112.00	-	-	-	-	-	-	-
TOTAL ASSETS	$ 109,540.28	$ 139,754.81	$ 261,862.33	$ 314,437.66	$ 949,435.52	$1,019,295.73	$1,409,439.38	$1,083,871.09
LIABILITIES								
Current Liabilities:								
Payable to Associated Companies	$ -	$ 340.46	$ -	$ -	$ -	$ -	$ -	$ -
Accounts Payable	8,689.98	27,432.35	65,888.45	70,790.38	147,235.01	149,017.21	220,934.65	186,217.61
Wages Payable	-	2,989.38	22,992.94	29,950.03	50,711.34	74,983.39	90,136.36	110,803.45
C.O.D.'s Unremitted	-	23.38	3.49	-	-	-	-	-
Taxes Accrued	125.00	1,572.19	14,134.71	38,562.81	101,444.33	111,238.75	366,024.47	55,531.25
Other Current Liabilties	-	70.36	1,412.88	13,209.29	15,757.91	25,292.38	37,467.66	47,793.81
Total Current Liabilities	8,814.98	32,428.12	104,432.47	152,512.51	315,148.59	360,531.73	714,563.14	400,346.12
Equipment & Other Long-Term Obligations:								
Equipment Obligations	-	-	-	-	138,270.16	122,420.96	76,532.30	75,258.54
Other Long-Term Obligations	-	-	-	-	-	-	4,800.00	2,400.00
Total Equipment & Other Long-Term Obligations	-	-	-	-	138,270.16	122,420.96	81,332.30	77,658.54
Deferred Credits:								
Other Deferred Credits	-	2,843.85	7,151.98	4,383.81	215.61	13,346.32	12,641.76	1,519.71
Reserves:								
Insurance Reserves	-	-	1,092.96	3,148.41	3,394.02	5,935.61	14,861.21	13,323.42
Capital Stock:								
Common	100,000.00	100,000.00	125,000.00	150,000.00	450,000.00	450,000.00	450,000.00	450,000.00
Capital Stock Subscribed	-	-	25,000.00	-	-	-	-	-
Total Capital Stock	100,000.00	100,000.00	150,000.00	150,000.00	450,000.00	450,000.00	450,000.00	450,000.00
Unappropriated Surplus:								
Earned Surplus to January 1	-	725.30	4,482.84	815.08*	4,392.93	42,407.14	67,061.11	136,040.97
Income Balance for Year	725.30	4,227.28	5,278.81*	5,216.17	37,562.09	59,045.98	61,867.24	20,311.68*
Other Credits for Year	-	.92	6.39	52.83	766.13	773.98	7,122.68	26,249.31
Other Debits for Year	-	470.66*	25.50*	60.99*	314.01*	35,165.99*	10.06*	955.30*
Total Unappropriated Surplus	725.30	4,482.84	815.08*	4,392.93	42,407.14	67,061.11	136,040.97	141,023.30
TOTAL LIABILITIES	$ 109,540.28	$ 139,754.81	$ 261,862.33	$ 314,437.66	$ 949,435.52	$1,019,295.73	$1,409,439.38	$1,083,871.09

* Denotes Red

Commitments for Purchase Options (See attached).

[fol. 484]

COMMITMENTS FOR PURCHASE OPTIONS PENDING

As of December 31, 1939		
Ozark Truck Lines, Inc. — Truck Line	$15,000.00	($1,000.00 deposited in escrow)
Bennett Truck Line — " "	1,000.00	
Reddish Truck Service — " "	60,000.00	($1,000.00 deposited in escrow)
Blake Truck Line — " "	2,100.00	
Total	$78,100.00	
As of December 31, 1940		
None		
As of December 31, 1941		
Missouri-Arkansas Transportation Co.	$12,600.00	
As of December 31, 1942		
Missouri-Arkansas Transportation Co.	$ 9,800.00#	
Missouri Transportation Company	750.00	
Keystone Freight Lines	30,000.00	
Mayers-National Truck Line	4,000.00	
Total	$44,550.00	
As of December 31, 1943		
Missouri-Arkansas Transportation Co.	$ 5,600.00#	
Powell Bros. Truck Lines, Inc.	7,200.00	
Righter Trucking Company, Inc.	20,000.00	
Total	$32,800.00	
As of December 31, 1944		
Missouri-Arkansas Transportation Co.	$ 1,400.00#	
Righter Trucking Company, Inc.	18,070.96#	
Total	$19,470.96	
As of December 31, 1945		
Righter Trucking Company, Inc.	$15,670.96#	

After applying monthly rental payments.

FRISCO TRANSPORTATION COMPANY

Tangible Property
As of December 31

	1938	*1939*	*1940*	*1941*	*1942*	*1943*	*1944*	*1945*
Revenue Equipmt.								
Freight	1,223.66	1,940.06	61,180.00	71,244.35	323,829.49	538,249.00	690,812.00	743,963.00
Less Depreciation		217.71	6,853.00	18,932.08	55,897.96	135,580.00	254,763.00	327,075.00
	1,223.66	1,722.35	54,327.00	52,312.27	267,931.53	402,669.00	436,049.00	416,888.00
Passenger		662.50		10,234.48	54,972.47	75,769.00	115,568.00	116,560.00
Less Depreciation		64.40		868.21	9,302.18	22,341.00	36,473.00	41,499.00
		598.10		9,366.27	45,670.29	53,428.00	79,095.00	75,061.00
Service Cars & Equipmt.			541.00	1,268.32	1,268.32	7,489.00	7,489.00	10,702.00
Less Depreciation			73.00	297.95	465.47	766.00	1,776.00	4,362.00
			468.00	970.37	802.85	6,723.00	5,713.00	6,340.00
Shop & Garage Equipmt.	130.34		583.00	582.87	6,580.31	8,914.00	11,447.00	17,647.00
Less Depreciation			15.00	50.02	500.63	1,105.00	2,034.00	3,332.00
	130.34		568.00	532.85	6,079.68	7,809.00	9,413.00	14,315.00
Furniture & Office Equip.	125.00	523.22	3,344.00	3,563.86	3,863.60	3,786.00	3,916.00	4,881.00
Less Depreciation			58.00	278.44	483.98	767.00	1,031.00	1,369.00
	125.00	523.22	3,286.00	3,285.42	3,379.62	3,019.00	2,885.00	3,512.00
Miscellaneous Equipmt.			115.00	270.26	270.26	348.00	348.00	534.00
Less Depreciation				10.14	28.86	61.00	91.00	144.00
			115.00	260.12	241.40	287.00	257.00	390.00
Total Net Book Cost	1,479.00	2,843.67	58,764.00	66,727.30	324,105.37	473,935.00	533,412.00	516,506.00

[fol. 486] FRISCO TRANSPORTATION COMPANY

Intangible Property—Organization, Franchises, and Permits

As of December 31, 1945

Organization—Cost to Incorporate

Delaware	$ 174.16
Missouri	68.92
Arkansas	31.06
Oklahoma	26.57
Kansas	42.56
Texas	58.05
Total Organization	401.32

Franchises

Bus Operation	—Springfield, Mo. to Seneca, Mo.	477.22
" "	—Afton, Okla. to Seneca, Mo.	119.85
" "	—Poplar Bluff, Mo. to Wappapello, Mo.	30.91
" "	— " " , " to Kennett, Mo.	517.78
Truck "	—Paris, Texas to Hugo, Okla. (Northbound)	52.18
Bus "	—Extension—Poplar Bluff, Mo. to Cape Girardeau, Mo.	97.92
" "	—Puxico, Mo. and Poplar Bluff, Mo. to Cape Girardeau, Mo.	167.98
" "	—Missouri State Line to Wichita, Kansas	35.00
" "	—Extension—Arbyrd, Mo. to Leachville, Ark.	82.85
Truck "	—Extension—Walnut Ridge, Ark. to Datto, Ark., Osceola, Ark. to Marked Tree, Ark., and Barfield, Ark. to Blytheville, Ark.	234.71
" "	—Camp Leonard Wood, Mo. to Rolla, Mo.	39.03
Bus "	—Rolla, Newburg, Alhambra Grotto, and Fort Leonard Wood, Mo.	3.97
" "	—Springfield, Mo. to Ft. Leonard Wood, Mo.	65.88
" "	—Leachville, Ark. to Missouri State Line	25.00
" "	—Kansas State Line to Wichita, Kans.	726.99
Total Franchises		2677.27
Total Organization, Franchises, and Permits		$3078.59

[fol. 487]

FRISCO TRANSPORTATION COMPANY

Sheet No. 1

Other Intangible Property

As of December 31, 1945

	Cost	Reserve for Amortization	Net
John Hamm, d/b/a Southwest Freight Lines	$ 2,653.13	$ —	$ 2,653.13
J. A. Rose	62.14		62.14
J. D. Cooper, d/b/a Southwest Truck Line	589.93	—	589.93
J. W. Parker Truck Line	3,054.11	—	3,054.11
Tolson Transfer	2,494.10	—	2,494.10
Price Bus Line	3,383.53	—	3,383.53
Scofield Bus Line	9,256.05	—	9,256.05
C. A. Vicory Bus Line	2,516.10	—	2,516.10
Reddish Truck Service	31,644.89	18,986.94	12,657.95
Blake Truck Line	1,097.94	658.74	439.20
T. N. Bennett Truck Line	1,059.23	1,059.23	—
Ozark Truck Line	4,644.50	4,644.50	—
G. G. Hutton, d/b/a Grand River Bus Line	144.92	—	144.92
Powell Bros. Truck Line	2,000.00	2,000.00	—
" " " "	12,587.19	12,587.19	—
City Transfer Service (G. W. Moore)	25.00	25.00	—
Midwest Freight Lines	3,850.00	3,850.00	—
Shumpert Truck Lines	250.00	—	250.00
Keystone Freight Lines	30,264.95	30,264.95	—
Luper Transportation Company	18,350.30	18,350.30	—
Powell Bros. Truck Line	6,900.00	—	6,900.00
Mayers National Truck Line	4,000.00	4,000.00	—
Missouri Transportation Company	750.00	750.00	—

(Continued)

[fol. 488]

FRISCO TRANSPORTATION COMPANY

Sheet No. 2

Other Intangible Property (Cont'd)

As of December 31, 1945

		Cost	Reserve for Amortization	Net
Truck Line to serve Vichy, Mo.		$ 9.37	$ —	$ 9.37
" " between Licking, Mo. and Salem, Mo.		61.15	—	61.15
" " between Muskogee, Okla. and Westville, Okla.		32.85	—	32.85
" " between Camp Crowder, Mo. and Neosho, Mo.		169.32	—	169.32
" " between Malden Flying School and Poplar Bluff, Mo.		44.66	—	44.66
" " between Kansas City, Mo. and Clinton, Mo. and from Collins, Mo. to Lebanon, Mo.		76.41	—	76.41
" " between Kansas City, Mo. and Springfield, Mo. and between St. Louis, Mo. and Joplin, Mo.		5.66	—	5.66
" " between Columbus, Miss. and State Line		50.00	—	50.00
Bus " between Winona, Mo. and Salem, Mo.		19.25	—	19.25
Truck " between St. Louis, Mo. and Blytheville, Ark.		1,845.64	—	1,845.64
Totals		$143,892.32	$97,176.85	$46,715.47

[fol. 489]

Exhibit No. 2-A

FRISCO TRANSPORTATION COMPANY

Statement Showing Details of the Purchase of Common Carrier Rights From John Hamm, J. A. Rose, Joe Cooper, J. W. Parker, Louis Tolson and T. N. Bennett.

Date Acquired	Vendor	I.C.C. Docket No. Finance	I.C.C. Docket No. MC	Rights	Tangible Property	Paid to Seller	Hearing Expenses	Total Cost
1/ 3/39	John Hamm	MCF- 618	89913, Sub- 1	$2,586.00	$ 914.00	$ 3,500.00	$ 67.13	$ 3,567.13
1/ 3/39	J. A. Rose	MCF- 619	89913, Sub- 2	25.00	—	25.00	37.14	62.14
1/ 3/39	Joe Cooper	MCF- 578	89913, Sub- 3	575.00	625.00	1,200.00	14.93	1,214.93
5/10/39	J. W. Parker	MCF- 678	89913, Sub- 5	2,950.00	1,050.00	4,000.00	104.11	4,104.11
5/10/39	Louis Tolson	MCF- 679	89913, Sub- 6	2,390.00	610.00	3,000.00	104.10	3,104.10
3/15/40	T. N. Bennett	MCF-1037	89913, Sub-10	1,000.00	—	1,000.00	59.23	1,059.23
	Totals			$9,526.00	$3,199.00	$12,725.00	$386.64	$13,111.64

[fol. 490]

Exhibit No. 3-A

FRISCO TRANSPORTATION COMPANY

Classification and Number of Truck Employees

	General Office	Road Drivers	Agents and Clerks	C&D Drivers	Dockmen	Shops & Stores Dept.	Total
12/31/38	2	2	—	—	—	—	4
1/31/39	2	6	3	2	2	—	15
4/30/39	3	7	6	8	2	—	26
5/31/39	3	18	12	13	8	—	54
2/29/40	6		24	23	24	—	132
3/31/40	7	64	30	28	40	11	180
3/31/41	11	91	42	60	52	19	275
3/31/42	13	86	52	60	63	27	301
3/31/43	23	105	60	85	109	49	431
3/31/44	20	152	64	105	141	80	562
3/31/45	23	151	83	145	143	108	653
3/15/46	21	160	90	175	176	141	763

[fol. 491]

Exhibit No. 4-A

FRISCO TRANSPORTATION COMPANY

Investment Account
(Net Book Cost after deducting Depreciation and Amortization)

As of December 31	Tangible Property	Intangible Property	Total
1938	$ 1,479	$ 5,001	$ 6,480
1939	2,844	27,288	30,132
1940	58,764	60,199	118,963
1941	66,727	55,487	122,214
1942	324,105	57,885	381,990
1943	473,935	74,399	548,334
1944	533,412	56,674	590,086
1945	516,506	49,794	566,300

[fol. 492]

Exhibit No. 5-A

FRISCO TRANSPORTATION COMPANY

Tons of Revenue Freight Handled

For Year	Exclusive Truck	Joint Rail-Truck	Total
1938	——	244	244
1939	11,585	10,438	22,023
1940	62,407	31,756	94,163
1941	94,832	45,040	139,872
1942	67,530	91,899	159,429
1943	84,644	140,608	225,252
1944	111,243	163,090	274,333
1945	117,521	158,212	275,733
Total	549,762	641,287	1,191,049

[fol. 493]

Exhibit No. 6-A

FRISCO TRANSPORTATION COMPANY

Income Account in Condensed Form

For Year	Revenues	Expenses	Net Operating Revenues	Net Income
1938	$ 13,438.72	$ 12,588.42	$ 850.30	$ 725.30
1939	158,742.11	153,456.28	5,285.83	4,227.28
1940	696,609.05	698,255.19	1,646.14*	5,278.81*
1941	1,005,802.14	994,833.91	10,968.23	5,216.17
1942	1,355,348.71	1,284,220.12	71,128.59	37,562.09
1943	2,051,642.44	1,915,632.45	136,009.99	59,045.98
1944	2,893,375.71	2,520,015.84	373,359.87	61,867.24
1945	2,855,987.73	2,855,958.49	29.24	20,311.68*
Total	$11,030,946.61	$10,434,960.70	$595,985.91	$143,053.57

* Denotes Red.

[fol. 494] EXHIBIT No. 7-A

FRISCO TRANSPORTATION COMPANY

Trucks and Tractors Operated

	Owned	Leased	Total
12/31/38	2	2	4
12/31/39	—	20	20
12/31/40	53	51	104
12/31/41	53	68	121
12/31/42	164	11	175
12/31/43	226	9	235
12/31/44	277	5	282
12/31/45	278	40	318

Trailers

12/31/38	2	2	4
12/31/39	3	17	20
12/31/40	42	33	75
12/31/41	45	38	83
12/31/42	138	3	141
12/31/43	186	3	189
12/31/44	215	3	218
12/31/45	255	3	258

[fol. 495] EXHIBIT No. 10-A

No. MC-89913 Sub 1—Joplin-Miami

MC-F-618

FTC—Purchase—John Hamm

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CERTIFICATES ISSUED:
March 31, 1942
July 16, 1943
December 20, 1943.

For Complete Copies
See Exhibit No. 16-A

1

[fol. 496] COPY

INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS
Washington

January 11, 1939

Please refer to file X-303

Frisco Transportation Company,
906 Olive Street,
St. Louis, Missouri.

Gentlemen:

The Commission by its Order No. MC-F-618 authorized the purchase by Frisco Transportation Company of operat-

ing rights and property of John Hamm, doing business as Southwest Freight Line.

In the event the transaction authorized by the Order has been consummated, you are required to issue, file with this Commission, and post for public inspection an adoption notice adopting all tariffs, powers of attorney, etc., filed with the Commission by or in behalf of the selling carrier. In preparing your adoption notice, use the exact working of the specimen enclosed, and forward *three copies* to this Commission for filing. You should, of course, add in the space directly after the words "prior to" and in the space directly after the word "Effective" the date the transaction authorized by the Order was actually consummated; and add in the space directly after the word "Issue" the date you actually prepare the adoption notice.

You should furnish a copy of your adoption notice to each agent that may have on file with this Commission tariffs to which the selling carrier is a party.

It appears from the records that the only effective power of attorney on file for the account of the selling carrier is a power of attorney designated as MFXA1 No. 2 in favor of Agent C. F. Jackson. You should take appropriate action in connection with this power of attorney.

If you desire additional information in connection with the instructions contained in this letter, please feel free to communicate with this office.

Very truly yours,

W. Y. Blanning, Director

End

CC—Mr. James F. Miller,
District Director
Bureau of Motor Carriers, I.C.C.
Carbide and Carbon Bldg.,
912 Baltimore Avenue,
Kansas City, Missouri

2

[fol. 497] COPY

FRISCO TRANSPORTATION COMPANY
Springfield, Mo.
February 24, 1939

File FTC-A-7-T.

MC-F-578—Frisco Transp. Co.—Purchase—
Joseph D. Cooper

MC-F-618—Frisco Transp. Co.—Purchase—
John Hamm.

Mr. W. Y. Blanning, Director,
Bureau of Motor Carriers,
Washington, D. C.

Dear Mr. Blanning

Please refer to your file X-303, in connection with filing Adoption Notices.

There is attached hereto three copies each, Frisco Transportation Company Adoption Notice MF-I.C.C. No. 2, covering John Hamm, d/b/a Southwest Freight line and MF-I.C.C. No. 3, covering Joseph D. Cooper, d/b/a Southwest Truck Line.

Yours very truly,

R. C. Bryant
Ass't. General Manager

RCB:C

c.c.
Mr. J. F. Miller, District Director,
Bureau of Motor Carriers,
Kansas City, Missouri.
Midwestern Motor Freight Tariff Bureau
3 West Ninth Street,
Kansas City, Missouri.
Mr. C. F. Jackson, Agent,
National Motor Freight Classification,
Washington, D. C.
Mr. G. M. Brewer, General Freight Agent,
Santa Fe Trails Transportation Co.
Wichita, Kansas.

[fol. 498] MF-I.C.C. No. 2.

No Supplement to this tariff will be issued except for the purpose of cancelling the tariff, unless otherwise specifically authorized by the Commission.

FRISCO TRANSPORTATION COMPANY

ADOPTION NOTICE

The *Frisco Transportation Company*

hereby adopts, ratifies, and makes its own, in every respect as if the same had been originally filed and posted by it, all tariffs, classifications, rules, notices, concurrences, traffic agreements, divisions, authorities, powers of attorney or other instruments whatsoever, including supplements or amendments thereto, filed with the Interstate Commerce Commission by or heretofore adopted by *John Hamm, doing business as Southwest Freight Line,* prior to *January 3, 1939.*

Issued: *February 24, 1939* Effective: *January 3, 1939*

Issued under authority of Special Circular M No. 1 and in conformity with Interstate Commerce Commission Docket No. MC-F-618

ISSUED BY

R. C. Bryant
Ass't. General Manager
Springfield, Mo.

4

[fol. 499] COPY

INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

January 28, 1939

Please refer to File X-650

Frisco Transportation Co.,
Room 110, Frisco Building,
Springfield, Missouri.

Gentlemen:

This will acknowledge receipt of power of attorney MFXA2 No. 2 in favor of C. E. Jackson, agent—John V. Lawrence, alternate agent. This is the first power of attorney filed by you which is numbered in your MFXA2 series.

You are advised that to each form of power of attorney filed, whether it be MFXA1, MFXA2 or MFXA3, there should be assigned a separate series of numbers. These numbers should run consecutively in the series of the issuing carrier, beginning with No. 1. No numbers should be skipped and none duplicated.

In line with the above, you should advise the Commission as to the disposition of MFXA2 No. 1. If you have assigned this number to another power of attorney issued by your company, the original thereof should be filed with the Commission at an early date. If, on the other hand, you have not assigned this number to any document which you have issued, you should advise the Commission by letter that this number will not be used.

Your attention is directed to the provisions of Rule 10 (h) of Tariff Circular MF No. 2, which require, with certain few exceptions, that the originals of all concurrences shall be forwarded direct to the Commission as soon as possible after the date of their issuance.

Very truly yours,

W. Y. Blanning, Director

5

[fol. 500] COPY

FRISCO TRANSPORTATION COMPANY
Springfield, Mo.,

February 3, 1939

File FTC-A-7-T

Mr. W. Y. Blanning, Director,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Sir:

Letter January 28th, file X-650, concerning Power of Attorney MFXA 2 No. 2, in favor of C. F. Jackson.

Wish to acknowledge that through inadvertence, the Power of Attorney referred to indicated No. 2. MFXA 2 No. 1 has not been previously used and in accordance with your letter will refrain from using same at a later date.

Yours very truly,

W. L. ENGLISH
General Manager

RCB:C

6

[fol. 501] Springfield, Mo.
January 18, 1939.

File FTC-B-1.

Mr. W. Y. Blanning, Director,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Mr. Blanning:

Replying to yours of January 13, file Finance No. MC-F-618, Frisco Transportation Company purchase John Hamm.

The transaction was completed in its entirety on January 3rd and the related journal entries will indicate that

draft covering the purchase price was delivered as of this date.

Yours very truly,

General Manager.

c.c. Mr. W. W. Dalton, Attorney,
Frisco Bldg.,
St. Louis, Missouri.

Mr. James F. Miller, Director,
District No. 10,
Kansas City, Missouri.

7

[fol. 502] AHM:rhs

INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

January 21, 1939

Please refer to file
Finance: No. MC-F-618

Mr. W. L. English,
General Manager,
Frisco Transportation Co.,
Springfield, Mo.

Dear Mr. English:

This will acknowledge receipt of your letter of January 18th, your file FTC-B-1, indicating the date of final consummation in the above-numbered finance docket, Frisco Transportation Company—Purchase—John Hamm, as January 3, 1939. All concerned are being requested to adjust their records accordingly.

It is assumed from the tenor of the second paragraph of your letter that there will be a further submission of journal entries in this connection.

Very truly yours,

(Sgd.) W. Y. Blanning
W. Y. Blanning, Director

Cy—Mr. James F. Miller,
Director, District No. 10,
Kansas City, Missouri.

[fol. 503] INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS
WASHINGTON

December 29, 1938
Refer to: 0-302
Docket Nos. MC 89913 Sub 1
89913 Sub 2

Frisco Transportation Company
906 Olive Street
St. Louis, Missouri

Gentlemen:

Please be referred to the orders of the Commission issued in Nos. MC-F 618 and 619, and decided November 30, 1938.

In No. MC-F 618 you were informed that the purchase of the operating rights of John Hamm under docket number 29652 had been approved pursuant to the above order. You are advised that the operating rights covered thereby have been assigned docket number 89913 Sub 1.

You are further advised that the operating rights of J. A. Rose which you were authorized to acquire under No. MC-F 619 have been assigned docket number MC 89913 Sub 2.

Henceforth any future correspondence that you may have concerning these applications should refer to the above docket numbers.

Your cooperation in this matter will be appreciated.

Very truly yours,

W. Y. Blanning, Director

cc—District Director Miller

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[fol. 504] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 14th Day of March, A. D. 1939

No. MC 89913 SUB 1

APPLICATION OF FRISCO TRANSPORTATION COMPANY, A CORPORATION, ST. LOUIS, MISSOURI

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity to applicant's predecessor in interest upon compliance with the terms of said order; that the purchase of the operations herein involved having been approved and authorized, as provided in Section 213 of the Motor Carrier Act, 1935; and that further consideration having been had:

It further appearing, That applicant or predecessor in interest was on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification *set forth as appended on reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the Motor Carrier Act, 1935, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public,* a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, and unless

on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order,* then said applicant shall show cause, if any there be, *within 60 days from the date of this order,* why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That the previous order entered in this proceeding describing the authority to which applicant's predecessor in interest has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(Seal)

10

[fol. 505] Appendix to the order of the

Interstate Commerce Commission, Division 5, dated the 14th day of March, A. D. 1939

No. MC 89913 Sub 1*

Application of Frisco Transportation Company, a Corporation, St. Louis, Missouri

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of the commodities indicated, over regular routes, between fixed

---

* This order embraces the authority applied for under Docket No. MC 29652, John Hamm, d/b/a Southwest Freight Line, Joplin, Mo., purchased by the applicant named herein pursuant to Finance Docket No. MC-F-618, approved November 30, 1938.

termini, and to and from intermediate points, is as specified below:

Commodities generally, except those of unusual value, and except high explosives, household goods (when transported as a separate and distinct service in connection with so-called "household movings"), commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Joplin, Mo., and Miami, Okla., as follows:

From Joplin over U. S. Highway 66 to Baxter Springs, Kans., thence over U. S. Highway 166 to junction U. S. Highway 69, thence over U. S. Highway 69 to Miami;

From Joplin over U. S. Highway 66 to Miami; and

Return over these routes to Joplin.

All intermediate points on the above-specified routes.

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[fol. 506] INTERSTATE COMMERCE COMMISSION

No. MC-15911

OZARK TRUCK LINES, INC., COMMON CARRIER APPLICATION

Decided February 19, 1942 (32 M.C.C. 459)

On reconsideration, applicants found not entitled to authority to serve certain intermediate points on the regular routes heretofore granted, and applications denied to the extent such authority is sought therein. Prior report, 27 M.C.C. 803.

W. W. Dalton for applicant in No. MC-89913 (Sub-No. 8), and other appearances shown in prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 5, COMMISSIONERS LEE, ROGERS, AND PATTERSON

BY DIVISION 5:

• • • • • • •

In *Frisco Transp. Co.—Purchase—Ozark Truck Lines, Inc.*, 35 M.C.C. 255, Frisco was authorized to acquire the remaining operating rights covered by No. MC-15911. It was stated that Frisco would abandon all rights claimed in No. MC-15911 to conduct irregular-route operations. By its acquired portion of that application, therefore, Frisco now seeks only a regular-route authority to operate between Treece, Kans., and St. Louis, Mo., over U. S. Highway 69 from Treece to the junction thereof with U. S. Highway 166, thence over the latter highway to Baxter Springs, Kans., thence over U. S. Highway 66 to St. Louis, and return over the same route, serving 34 intermediate points and 4 off-route points.

By virtue of its acquisition of other "grandfather" operating rights, Frisco has been granted certificates embracing the entire length of this route except that portion between Carthage and Springfield, Mo. Pursuant to authority granted in *Frisco Transp. Co.—Purchase—Hamm*, 15 M.C.C. 320, it purchased the operating rights claimed in "grandfather" application No. MC-29652; it was renumbered No. MC-89913 (Sub-No. 1), and by order therein, entered March 14, 1939, Frisco was granted a certificate

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[fol. 507] to operate between Miami, Okla., and Joplin, Mo., via Treece, serving all intermediate points. Pursuant to authority granted in *Frisco Transp. Co.—Purchase—Cooper*, 15 M.C.C. 317, Frisco purchased the operating rights claimed in "grandfather" application No. MC-20440; it was renumbered No. MC-89913 (Sub-No. 3), and by order therein, entered March 11, 1939, Frisco was granted a certificate to operate between Joplin and Carthage, serving Webb City and Carterville, Mo., as intermediate points. Ozark, pursuant to authority granted in *Ozark Truck Lines, Inc.—Purchase—Selby*, 5 M.C.C. 578, purchased the operating rights claimed in "grandfather" application No. MC-60074; that application was renumbered No. MC-15911 (Sub-No. 2), and the rights so acquired by Ozark were thereafter sold to Frisco pursuant to authority granted in *Frisco Transp. Co.—Purchase—Ozark Truck Lines, Inc., supra*; it was again renumbered No. MC-89913 (Sub-No. 9), and by order therein, entered May 25, 1940, Frisco was granted a certificate authorizing operation between Spring-

field and St. Louis, serving Conway, Phillipsburg, Lebanon, Waynesville, Rolla, and St. James, Mo., as intermediate points. (l.c. 461)

* * * * * * *

On reconsideration, we find that applicants are not entitled to authority to serve any points other than those authorized in the prior report herein and in certificates granted to Frisco Transportation Company in Nos. MC-89913 (Sub-No. 1), MC-89913 (Sub-No. 3), and MC-89913 (Sub-No. 9); and that applications Nos. MC-15911, MC-52600, MC-49375 (Sub-No. 1), and MC-89913 (Sub-No. 8), to the extent that authority is sought therein to serve the 21 points listed in footnote 7, should be denied.

Upon compliance with the requirements of sections 215 and 217 of the act, and with our rules and regulations thereunder, appropriate certificates will be issued to Frisco Transportation Company and St. Louis-Indianapolis Freight Lines, Inc. An order will be entered denying the applications to the extent indicated above. (l.c. 462)

[fol. 508] EXHIBIT No. 11-A

No. MC-89913 Sub 2—Hugo-Paris

MC-F-619

FTC—Purchase—J. A. Rose

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CERTIFICATES ISSUED:
March 2, 1940
March 31, 1942
July 16, 1943
Dec. 20, 1943

For Complete Copies
See Exhibit No. 169

1

[fol. 509] FRISCO TRANSPORTATION COMPANY

Springfield, Mo.
December 13, 1938

FTC-A-7-T

Interstate Commerce Commission,
Bureau of Motor Carriers,
Section of Traffic,
Washington, D. C.

Gentlemen:

Enclosed herewith, please find three copies of Frisco Transportation Company Adoption Notice, MF-I.C.C. No.

1, also three copies of Adoption Supplement No. 1 to J. A. Rose Tariff MF-I.C.C. No. 3, covering Class Rates between Hugo, Oklahoma and Paris, Texas.

Will you kindly acknowledge on duplicate of this letter enclosed.

Yours very truly,

Ass't. General Manager

RCB:C

RECEIVED
INTERSTATE COMMERCE COMMISSION
147734 DEC. 14, 1938
BUREAU OF MOTOR CARRIERS
SECTION OF TRAFFIC

2

[fol. 510]

MF-I.C.C. No. 3
Cancels
MF-I.C.C. Nos. 1 and 2

J. A. ROSE

LOCAL MOTOR FREIGHT TARIFF No. 3

NAMING CLASS RATES

FROM HUGO, OKLAHOMA TO PARIS, TEXAS

Governed except as otherwise provided herein, by National Motor Freight Classification No. 3, C. F. Jackson, Agent. MF-I.C.C. No. 5, Supplements to or successive issues thereof.

ISSUED MAY 5, 1938 EFFECTIVE JULY 1, 1938

Issued By

J. A. Rose, Owner
Paris, Texas

[fol. 511]

Rules and Regulations

RULE

Application of Rates

1 When property (other than specifically excepted) is tendered to this carrier consigned to a point listed to be served under the tariff of this carrier the same will be accepted and transported by this carrier to the billed destination at charges based on the rates provided on page 4 of this tariff.

Pickup and Delivery Service

2 Rates named herein include pickup and delivery within the corporate limits of cities and towns listed.

Articles Not Accepted

The following property will not be accepted for shipment, nor as premiums accompanying other articles:

Bank Bills, Coin or Currency.
Deeds, Drafts, Notes or Valuable Papers of any kind.
Jewelry.
Postage Stamps, Letters or Packets or Letters with
3 or without Postage Stamps affixed.
Precious Metals or articles manufactured therefrom.
Precious Stones.
Revenue Stamps.
Other articles of extraordinary value.
Live Stock, Pets or Animals.
Fish or Oysters.
Corpses.
High Explosives.
Any Articles liable to impregnate other freight.

Delivery

If a shipment is once tendered for delivery at the billed address, between the hours of 7 A.M. and 6 P.M.,

and such delivery cannot be accomplished through no fault of the carrier, no further effort will be made to effect delivery, except on request, and at an additional charge of 10 cents for each 100 pounds or fraction thereof for each tender, minimum 25 cents.

[fol. 512]

Rules and Regulations

RULE

Storage

(a) Forty-eight hours free time will be allowed, which free time will be computed from the first 7:00 A.M. after arrival of shipment at destination.

(b) Shipments held on the premises of this company in excess of free time allowed will be subject to the following storage charges per day, or, at option of carrier, may be sent to public warehouse.

(c) For each of the first five days, 1½ cents per hundred pounds. For the sixth and each succeeding day 3 cents per hundred pounds.

In computing time, Sundays and legal holidays (National, State and Municipal) but not half holidays will be excluded. Fractions of a day are to be considered as one day and fractions of a hundred pounds to be considered at one hundred pounds. Minimum charge, twenty-five (25) cents per day, per shipment.

Note—In addition to rate named for storage, a charge of 10 cents per 100 pounds will be made for extra handling of shipment sent to the public warehouse.

Impracticable Operation

Nothing in the tariff shall be construed as making it binding on the part of this Carrier to receive freight for destinations to which, on account condition of roads, it is impracticable to operate trucks, or to make deliveries at locations at destination stations to which location account conditions of streets or roadways, it is impracticable to operate trucks. In such latter cases, notice shall be given consignee and delivery made at terminal depot.

MINIMUM CHARGES

7 A minimum charge for a single shipment handled under this tariff will be 35¢.

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[fol. 513]

SECTION ONE

DISTANCE IN MILES

	Between Hugo, Okla.
And	
Paris, Texas	26

SECTION TWO

CLASS RATES

Distance in Miles	Class Rates in Cents per 100 Pounds			
	1	2	3	4
26	37	31	26	20

6

[fol. 514]

Supplement No. 1
To
MF-I.C.C. No. 3
(J. A. Rose)

FRISCO TRANSPORTATION COMPANY

Adoption of

J. A. ROSE

LOCAL FREIGHT TARIFF No. 3

NAMING

CLASS RATES

BETWEEN

HUGO, OKLAHOMA AND PARIS, TEXAS

NOTICE

Effective December 15, 1938, this tariff became the tariff of the Frisco Transportation Company as per its Adoption Notice MF-I.C.C. No. 1

Issued December 12, 1938

Issued under authority of Rule 1, (a) (2) of Special Circular M No. 1 of the Interstate Commerce Commission and in compliance with the Order in Case No. MC-F-619.

Issued By

R. C. Bryant
Ass't. General Manager
Springfield, Missouri

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[fol. 515] M.F.I.C.C. No. 1

FRISCO TRANSPORTATION COMPANY

Adoption Notice

The Frisco Transportation Company hereby adopts, ratifies, and makes its own, in every respect, as if the same had been originally filed and posted by it, all tariffs, classifications, rules, notices, concurrences, traffic agreements, divisions, authorities, powers of attorney or other instruments whatsoever, including supplements or amendments thereto, filed with the Interstate Commerce Commission by, or heretofore adopted by J. A. Rose prior to December 15, 1938.

Issued December 12, 1938

Issued under authority of Rule 1, (a) (2) of Special Circular M No. 1 of the Interstate Commerce Commission and in compliance with the order in Case No. MC-F-619

Issued By

R. C. Bryant,
Ass't. General Manager
Springfield, Missouri.

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[fol. 516] COPY

INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

January 28, 1939

Please refer to File X-650

Frisco Transportation Co.,
Room 110, Frisco Building,
Springfield, Missouri.

Gentlemen:

This will acknowledge receipt of power of attorney MFXA2 No. 2 in favor of C. E. Jackson, agent—John V. Lawrence, alternate agent. This is the first power of attorney filed by you which is numbered in your MFXA2 series.

You are advised that to each form of power of attorney filed, whether it be MFXA1, MFXA2 or MFXA3, there should be assigned a separate series of numbers. These numbers should run consecutively in the series of the issuing carrier, beginning with No. 1. No numbers should be skipped and none duplicated.

In line with the above, you should advise the Commission as to the disposition of MFXA2 No. 1. If you have assigned this number to another power of attorney issued by your company, the original thereof should be filed with the Commission at an early date. If, on the other hand, you have not assigned this number to any document which you have issued, you should advise the Commission by letter that this number will not be used.

Your attention is directed to the provisions of Rule 10 (h) of Tariff Circular MF No. 2, which require, with certain few exceptions, that the originals of all concurrences shall be forwarded direct to the Commission as soon as possible after the date of their issuance.

Very truly yours,

W. Y. Blanning, Director

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[fol. 517] Copy

Frisco Transportation Company
Springfield, Mo.,
February 3, 1939

File FTC-A-7-T

Mr. W. Y. Blanning, Director,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Sir:

Letter January 28th, file X-650, concerning Power of Attorney MFXA 2 No. 2, in favor of C. F. Jackson.

Wish to acknowledge that through inadvertence, the Power of Attorney referred to indicated No. 2. MFXA 2 No. 1 has not been previously used and in accordance with your letter will refrain from using same at a later date.

Yours very truly,

W. L. English
General Manager

RCB:C

10

[fol. 518] Copy

Frisco Transportation Company
Springfield, Mo.,
January 18, 1939.

File FTC-B-7

Mr. W. Y. Blanning, Director,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Mr. Blanning:

Replying to yours of January 13th, file Finance No. MC-F-619, Frisco Transportation Company—Purchase—J. A. Rose.

The transaction was completed in its entirety on January 3rd and the related journal entries will indicate that draft covering the purchase price was delivered as of this date.

Yours very truly,

General Manager.

c.c. Mr. W. W. Dalton, Attorney,
Frisco Building,
St. Louis, Missouri.

Mr. James F. Miller, Director,
District No. 10,
Kansas City, Missouri.

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[fol. 519] AHM:rhs

COPY

INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

January 21, 1939

Please refer to file
Finance: No. MC-F-619

Mr. W. L. English,
General Manager,
Frisco Transportation Co.,
Springfield, Mo.

Dear Mr. English:

This will acknowledge receipt of your letter of January 18th, your file FTC-B-7, indicating the date of final consummation in the above-numbered finance docket, Frisco Transportation Company—Purchase—J. A. Rose, as January 3, 1939. All concerned are being requested to adjust their records accordingly.

It is assumed from the tenor of the second paragraph of your letter that there will be a further submission of journal entries in this connection.

Very truly yours,

W. Y. Blanning, Director.

Cy—Mr. James F. Miller,
Director, District No. 10,
Kansas City, Missouri.

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[fol. 520] INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS
WASHINGTON

December 29, 1938
Refer to: O-302
Docket Nos. MC 89913 Sub 1
89913 Sub 2

Frisco Transportation Company
906 Olive Street
St. Louis, Missouri

Gentlemen:

Please be referred to the orders of the Commission issued in Nos. MC-F 618 and 619, and decided November 30, 1938.

In No. MC-F 618 you were informed that the purchase of the operating rights of John Hamm under docket number 29652 had been approved pursuant to the above order. You are advised that the operating rights covered thereby have been assigned docket number 89913 Sub 1.

You are further advised that the operating rights of J. A. Rose which you were authorized to acquire under No. MC-F 619 have been assigned docket number MC 89913 Sub 2.

Henceforth any future correspondence that you may have concerning these applications should refer to the above docket numbers.

Your cooperation in this matter will be appreciated.

Very truly yours,

W. Y. Blanning, Director

cc—District Director Miller

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[fol. 521] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 15th day of March, A. D. 1939

No. MC 89913 SUB 2*

APPLICATION OF FRISCO TRANSPORTATION COMPANY, A CORPORATION, ST. LOUIS, MISSOURI

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity to applicant's predecessor in interest upon compliance with the terms of said order; that the purchase of the operations herein involved having been approved and authorized, as provided in Section 213 of the Motor Carrier Act, 1935; and that further consideration having been had;

It further appearing, That applicant or predecessor in interest was on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification *set forth as appended on reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the Motor Carrier Act, 1935, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public,* a certificate of public convenience and necessity shall be issued, unless

otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, and unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order,* then said applicant shall show cause, if any there be, *within 60 days from the date of this order,* why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That the previous order entered in this proceeding describing the authority to which applicant's predecessor in interest has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(Seal)

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[fol. 522] Appendix to the order of the Interstate Commerce Commission, Division 5, dated the 15th day of March, A. D. 1939

No. MC 89913 Sub 2*

Application of Frisco Transportation Company, a Corporation, St. Louis, Missouri

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign

commerce as a common carrier by motor vehicle of the commodities indicated, over the regular route, and between fixed termini, is as specified below:

Commodities generally, except those of unusual value, and except high explosives, household goods (when transported as a separate and distinct service in connection with so-called "household movings"), commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

From Hugo, Okla., to Paris, Tex.:

From Hugo over Oklahoma Highway 2 to the Oklahoma-Texas State line, thence over Texas Highway 24 to Paris, with no transportation for compensation in reverse direction.

---

* This order embraces the authority applied for under Docket No. MC 66229, J. A. Rose, Paris, Texas, purchased by the applicant named herein pursuant to Finance Docket No. MC-F-619, approved November 30, 1938.

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[fol. 523] INTERSTATE COMMERCE COMMISSION

No. MC-89913

FRISCO TRANSPORTATION COMPANY—
COMMON CARRIER APPLICATION.

St. Louis, Mo.

Report and order recommended by joint board No. 16, composed of A. S. J. Shaw of Oklahoma and R. E. Gray of Texas.

Served Aug. 1, 1939

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and

served on all other parties in interest, within 20 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. Otherwise, at the expiration of said period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions have been seasonably filed by other parties, or the order has been stayed or postponed by the Commission.

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[fol. 524] INTERSTATE COMMERCE COMMISSION

No. MC-89913

FRISCO TRANSPORTATION COMPANY
COMMON CARRIER APPLICATION

Submitted..... Decided .....

Certificate of public convenience and necessity authorizing described operations by applicant as a common carrier by motor vehicle, granted.

W. E. Allen, M. G. Roberts and *William W. Dalton* for applicant.

REPORT AND ORDER

RECOMMENDED BY JOINT BOARD No. 16, COMPOSED OF A. S. J. SHAW OF OKLAHOMA AND R. E. GRAY OF TEXAS

By application filed December 12, 1938, as amended, Frisco Transportation Company, of St. Louis, Mo., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, and except high explosives,

household goods (when transported as a separate and distinct service in connection with so called "household movings"), commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, from Paris, Texas, to Hugo, Okla., over Texas Highway 24 to Texas-Oklahoma State line, thence over Oklahoma Highway 2 to Hugo, from Paris serving intermediate points, and return over same route serving intermediate points only.

The application was referred to joint board No. 16 for hearing and the recommendation of an appropriate order thereon. Hearing was held at Dallas, Texas, on July 13, 1939. No one opposed the granting of the application.

Upon consideration of all evidence of record, the joint

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[fol. 525] board finds that present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, except those of unusual value, and except high explosives, household goods (when transported as a separate and distinct service in connection with so called "household movings"), commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, from Paris, Texas, to Hugo, Okla., over Texas Highway 24 from Paris to Texas-Oklahoma State line, thence over Oklahoma Highway 2 to Hugo, serving intermediate points, and return over the same route serving intermediate points only, and that applicant is fit, willing, and able properly to perform such service and to conform to the provisions of the act and the requirements, rules, and regulations of the Commission thereunder; and that an appropriate certificate should be granted.

In view of the findings herein, the joint board recommends that the appended order be entered.

By joint board No. 16.

(Signature) A. S. J. Shaw

(Signature) R. E. Gray

[fol. 526] Recommended by joint board No. 16, composed of A. S. J. Shaw of Oklahoma and R. E. Gray of Texas.

(Signature) A. S. J. Shaw

(Signature) R. E. Gray

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the day of A. D. 1939

No. MC-89913

FRISCO TRANSPORTATION COMPANY
COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by joint board No. 16, which board has made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon compliance with all requirements of sections 215 and 217 of the Motor Carrier Act, 1935, with the rules and regulations thereunder, a certificate be issued to applicant authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities described, and between the points and over the routes described in the findings in said report.

It is further ordered, That the above-described certificate be issued upon the condition that operations thereunder shall be conducted in accordance with all rules, regulations and requirements relating thereto, issued by the Commission under the Motor Carrier Act, 1935.

And it is further ordered, That this order shall be effective on

By the Commission, division 5.

W. P. Bartel,
Secretary.

(Seal)

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[fol. 527] Interstate Commerce Commission
Washington, D. C.

No. MC-89913

Frisco Transportation Company
Common Carrier Application
St. Louis, Mo.

August 21, 1939.

Notice to the Parties:

On August 1, 1939, in accordance with the provisions of Section 205 of the Motor Carrier Act, 1935, joint Board No. 16 served on the parties to the above-entitled proceeding its recommended order, accompanied by the reasons therefor. On the face of the report the following appeared:

> "Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest within 20 days from date of service shown above, or within such further period as may be authorized for the filing of such exceptions. Otherwise, at the expiration of said period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions have been seasonably filed by other parties, or the order has been stayed or postponed by the Commission."

No exceptions to the recommended order and report of joint board No. 16 were filed within the said 20-day period and the Commission did not stay or postpone the said order, which accordingly became the order of the Commission and became effective as of August 21, 1939.

W. P. Bartel,
Secretary.

Exhibit No. 12-A

No. MC-89913 Sub 3—Joplin-Carthage

MC-F-578

FTC—Purchase—Joseph D. Cooper

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Certificates Issued:
March 31, 1942
July 16, 1943
December 20, 1943

For Complete Copies
See Exhibit No. 16-A

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[fol. 529] COPY

INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

January 11, 1939
Please refer to file X-303

Frisco Transportation Company,
906 Olive Street,
St. Louis, Missouri.

Gentlemen:

The Commission by its Order No. MC-F-578 authorized the purchase by Frisco Transportation Company of operating rights and property of Joseph D. Cooper, doing business as Southwest Truck Line.

In the event the transaction authorized by the Order has been consummated, you are required to issue, file with this Commission, and post for public inspection an adoption notice adopting all effective tariffs, powers of attorney, etc., filed with the Commission by or in behalf of the selling carrier. In preparing your adoption notice, use the exact wording of the specimen enclosed, except as otherwise indicated on the specimen and forward *three copies* to this Commission for filing.

You should furnish a copy of your adoption notice to each agent that may have on file with this Commission tariffs to which the selling carrier is a party. You must also issue new powers of attorney, and thereby direct the cancelation of the powers of attorney issued by the selling carrier, or otherwise take appropriate action in connection with this matter.

If you desire additional information in connection with the instructions contained in this letter, please feel free to communicate with this office.

Very truly yours,

W. Y. Blanning, Director

CC—Mr. James F. Miller,
District Director,
Bureau of Motor Carriers,
Interstate Commerce Commission
Carbide and Carbon Bldg.,
912 Baltimore Avenue,
Kansas City, Missouri.

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[fol. 530] COPY

FRISCO TRANSPORTATION COMPANY
Springfield, Mo.
February 24, 1939

File FTC-A-7-T.

MC-F-578—Frisco Transp. Co.—Purchase—
Joseph D. Cooper

MC-F-618—Frisco Transp. Co.—Purchase—
John Hamm.

Mr. W. Y. Blanning, Director,
Bureau of Motor Carriers,
Washington, D. C.

Dear Mr. Blanning

Please refer to your file X-303, in connection with filing Adoption Notices.

There is attached hereto three copies each, Frisco Transportation Company Adoption Notice MF-I.C.C. No. 2, covering John Hamm, d/b/a Southwest Freight line and MF-I.C.C. No. 3, covering Joseph D. Cooper, d/b/a Southwest Truck Line.

Yours very truly,

R. C. Bryant
Ass't. General Manager

RCB:C

c.c.
Mr. J. F. Miller, District Director,
Bureau of Motor Carriers,
Kansas City, Missouri.

Midwestern Motor Freight Tariff Bureau
3 West Ninth Street,
Kansas City, Missouri.

Mr. C. F. Jackson, Agent,
National Motor Freight Classification,
Washington, D. C.

Mr. G. M. Brewer, General Freight Agent,
Santa Fe Trails Transportation Co.
Wichita, Kansas.

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[fol. 531] MF-I.C.C. No. 3.

No Supplements to this tariff will be issued except for the purpose of cancelling the tariff, unless otherwise specifically authorized by the Commission.

FRISCO TRANSPORTATION COMPANY
ADOPTION NOTICE

The Frisco Transportation Company

hereby adopts, ratifies, and makes its own in every respect as if the same had been originally filed and posted by it, all tariffs, classifications, rules, notices, concurrences, traffic agreements, divisions, authorities, powers of attorney or other instruments whatsoever, including supplements or amendments thereto, filed with the Interstate Commerce Commission by, or heretofore adopted by *Joseph D. Cooper, doing business as Southwest Truck Line,* prior to *January 3, 1939.*

Issued: *February 24, 1939* Effective: *January 3, 1939*

Issued under authority of Special Circular M No. 1, and in conformity with, Interstate Commerce Commission Docket No. MC-F-578.

ISSUED BY:

R. C. Bryant
Ass't. General Manager,
Springfield, Mo.

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[fol. 532] COPY

INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

January 28, 1939

Please refer to File X-650

Frisco Transportation Co.,
Room 110, Frisco Building,
Springfield, Missouri.

Gentlemen:

This will acknowledge receipt of power of attorney MFXA2 No. 2 in favor of C. E. Jackson, agent—John V. Lawrence, alternate agent. This is the first power of attorney filed by you which is numbered in your MFXA2 series.

You are advised that to each form of power of attorney filed, whether it be MFXA1, MFXA2 or MFXA3, there should be assigned a separate series of numbers. These numbers should run consecutively in the series of the issuing carrier, beginning with No. 1. No numbers should be skipped and none duplicated.

In line with the above, you should advise the Commission as to the disposition of MFXA2 No. 1. If you have

assigned this number to another power of attorney issued by your company, the original thereof should be filed with the Commission at an early date. If, on the other hand, you have not assigned this number to any document which you have issued, you should advise the Commission by letter that this number will not be used.

Your attention is directed to the provisions of Rule 10 (h) of Tariff Circular MF No. 2, which require, with certain few exceptions, that the originals of all concurrences shall be forwarded direct to the Commission as soon as possible after the date of their issuance.

Very truly yours,

W. Y. Blanning, Director

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[fol. 533] COPY

FRISCO TRANSPORTATION COMPANY
Springfield, Mo.,
February 3, 1939

File FTC-A-7-T

Mr. W. Y. Blanning, Director,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Sir:

Letter January 28th, file X-650, concerning Power of Attorney MFXA 2 No. 2, in favor of C. F. Jackson.

Wish to acknowledge that through inadvertence, the Power of Attorney referred to indicated No. 2. MFXA 2

No. 1 has not been previously used and in accordance with your letter will refrain from using same at a later date.

Yours very truly,

W. L. ENGLISH
General Manager

RCB:C

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[fol. 534] Springfield, Mo.
January 18, 1939.

File FTC-B-1.

Mr. W. Y. Blanning, Director,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Mr. Blanning:

Replying to yours of January 13th, file Finance No. MC-F-578, Frisco Transportation Company purchase Joseph D. Cooper.

The transaction was completed in its entirety on January 3rd and the related journal entries will indicate that draft covering the purchase price was delivered as of this date.

Yours very truly,

General Manager.

c.c. Mr. W. W. Dalton, Attorney,
Frisco Bldg.,
St. Louis, Missouri.

Mr. James F. Miller, Director,
District No. 10,
Carbon & Carbide Bldg.,
Kansas City, Missouri.

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[fol. 535] AHM:rhs

INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS
WASHINGTON

January 21, 1939

Please refer to file
Finance: No. MC-F-578

Mr. W. L. English,
General Manager,
Frisco Transportation Co.,
Springfield, Missouri.

Dear Mr. English:

This will acknowledge receipt of your letter of January 18th, your file FTC-B-1, indicating the date of final consummation in the above-numbered finance docket, Frisco Transportation Company—Purchase—Joseph D. Cooper, as January 3, 1939. All concerned are being requested to adjust their records accordingly.

It is assumed from the tenor of the second paragraph of your letter that there will be a further submission of journal entries in this connection.

Very truly yours,

(Sgd.) W. Y. Blanning

W. Y. Blanning, Director

Cy—Mr. James F. Miller,
Director, District No. 10,
Kansas City, Missouri.

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[fol. 536] No letter received from Mr. Blanning advising of assignment of a sub number.

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[fol. 537] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 11th day of March, A. D. 1939

No. MC 89913 SUB 3*

APPLICATION OF FRISCO TRANSPORTATION COMPANY, ST. LOUIS, MISSOURI

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity to applicant's predecessor in interest upon compliance with the terms of said order; that the purchase of the operations herein involved having been approved and authorized, as provided in Section 213 of the Motor Carrier Act, 1935; and that further consideration having been had;

It further appearing, That applicant or predecessor in interest was on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification *set forth as appended on reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the Motor Carrier Act, 1935, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public,* a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, and unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order,* then said applicant shall show cause, if any there be, *within 60 days from the date of this order,* why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That the previous order entered in this proceeding describing the authority to which applicant's predecessor in interest has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(Seal)

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[fol. 538] Appendix to the order of the Interstate Commerce Commission, Division 5, dated the 11th day of March, A. D. 1939

No. MC 89913 Sub 3*

Application of Frisco Transportation Company, St. Louis, Missouri

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of the commodities indicated, over the regular route, between fixed termini, and to and from intermediate points, is as specified below:

Commodities generally, except those of unusual value, and except high explosives, household goods (when transported as a separate and distinct service in connection with so-called "household movings"), commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading.

Between Joplin, Mo., and Carthage, Mo.:

From Joplin over U. S. Highway 66 to Carthage, and return over the same route.

Intermediate points: Carterville and Webb City, Mo.

* This order embraces the authority applied for under Docket No. MC 20440, Joseph D. Cooper, d/b/a Southwest Truck Line, Joplin, Mo., purchased by the applicant named herein pursuant to Finance Docket No. MC-F-578, approved November 30, 1938.

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[fol. 539] INTERSTATE COMMERCE COMMISSION

No. MC-15911

OZARK TRUCK LINES, INC., COMMON CARRIER APPLICATION

Decided February 19, 1942 (32 M.C.C. 459)

On reconsideration, applicants found not entitled to authority to serve certain intermediate points on the regular routes heretofore granted, and applications denied to the extent such authority is sought therein. Prior report, 27 M.C.C. 803.

W. W. Dalton for applicant in No. MC-89913 (Sub-No. 8), and other appearances shown in prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 5, COMMISSIONERS LEE, ROGERS, AND PATTERSON

BY DIVISION 5:

• • • • • • •

In *Frisco Transp. Co.—Purchase—Ozark Truck Lines, Inc.*, 35 M.C.C. 255, Frisco was authorized to acquire the remaining operating rights covered by No. MC-15911. It was stated that Frisco would abandon all rights claimed in No. MC-15911 to conduct irregular-route operations. By its acquired portion of that application, therefore, Frisco now seeks only a regular-route authority to operate between Treece, Kans., and St. Louis, Mo., over U. S. Highway 69 from Treece to the junction thereof with U. S. Highway 166, thence over the latter highway to Baxter Springs, Kans., thence over U. S. Highway 66 to St. Louis, and return over the same route, serving 34 intermediate points and 4 off-route points.

By virtue of its acquisition of other "grandfather" operating rights, Frisco has been granted certificates embracing the entire length of this route except that portion between Carthage and Springfield, Mo. Pursuant to authority granted in *Frisco Transp. Co.—Purchase—Hamm*, 15 M.C.C. 320, it purchased the operating rights claimed in "grandfather" application No. MC-29652; it was renumbered No. MC-89913 (Sub-No. 1), and by order therein, entered March 14, 1939, Frisco was granted a certificate to

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[fol. 540] operate between Miami, Okla., and Joplin, Mo., via Treece, serving all intermediate points. Pursuant to authority granted in *Frisco Transp. Co.—Purchase—Cooper*, 15 M.C.C. 317, Frisco purchased the operating rights claimed in "grandfather" application No. MC-20440; it was renumbered No. MC-89913 (Sub-No. 3), and by order therein, entered March 11, 1939, Frisco was granted a certificate to operate between Joplin and Carthage, serving Webb City and Carterville, Mo., as intermediate points. Ozark, pursuant to authority granted in *Ozark Truck Lines, Inc.—Purchase—Selby*, 5 M.C.C. 578, purchased the operating rights claimed in "grandfather" application No. MC-60074; that application was renumbered No. MC-15911 (Sub-No. 2), and the rights so acquired by Ozark were thereafter sold to Frisco pursuant to authority granted in *Frisco Transp. Co.—Purchase—Ozark Truck Lines, Inc., supra;* it was again renumbered No. MC-89913 (Sub-No. 9),

and by order therein, entered May 25, 1940, Frisco was granted a certificate authorizing operation between Springfield and St. Louis, serving Conway, Phillipsburg, Lebanon, Waynesville, Rolla, and St. James, Mo., as intermediate points. (l.c. 461)

* * * * * * *

On reconsideration, we find that applicants are not entitled to authority to serve any points other than those authorized in the prior report herein and in certificates granted to Frisco Transportation Company in Nos. MC-89913 (Sub-No. 1), MC-89913 (Sub-No. 3), and MC-89913 (Sub-No. 9); and that applications Nos. MC-15911, MC-52600, MC-49375 (Sub-No. 1), and MC-89913 (Sub-No. 8), to the extent that authority is sought therein to serve the 21 points listed in footnote 7, should be denied.

Upon compliance with the requirements of sections 215 and 217 of the act, and with our rules and regulations thereunder, appropriate certificates will be issued to Frisco Transportation Company and St. Louis-Indianapolis Freight Lines, Inc. An order will be entered denying the applications to the extent indicated above.
(l.c. 462)

EXHIBIT No. 13-A

No. MC-89913 Sub 5—Memphis-Blytheville

MC-F-678

FTC—Purchase—Joseph W. Parker

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CERTIFICATES ISSUED:
April 18, 1942
July 16, 1943
December 20, 1943

For Complete Copies
See Exhibit No. 16-A

1

[fol. 542] COPY

FRISCO TRANSPORTATION COMPANY

Springfield, Mo.
April 22, 1939

MC F-678—Frisco Transportation Co.—Purchase—
J. W. Parker Truck Line.

MC F-679—Frisco Transportation Co.—Purchase—
Louis Tolson, d/b/a Tolson Transfer.

Mr. W. Y. Blanning, Director,
Bureau of Motor Carriers,
Interstate Commerce Commission,
Washington, D. C.

Dear Mr. Blanning:

Purchases by the Frisco Transportation Co. in the above styled cases approved by Division 5 of the Interstate Commerce Commission, April 12, 1939.

You will please find attached hereto, three copies each, Frisco Transportation Company Adoption Notices MF-I.C.C. Nos. 5 and 6, covering purchase Louis Tolson, d/b/a Tolson Transfer and Joseph Washington Parker, d/b/a J. W. Parker Truck Line.

Yours very truly,

General Manager

RCB:C
c.c.

Mr. Ray Atherton, District Director,
Bureau of Motor Carriers,
Wallace Bldg., Little Rock, Ark.

Mr. J. D. Hughett, Agent,
1806 Santa Fe Bldg., Dallas, Texas

Mr. C. F. Jackson, Agent,
1039 Investment Bldg.,
Washington, D. C.

[fol. 543] MF-I.C.C. No. 6

No Supplement to this tariff will be issued except for the purpose of cancelling the tariff, unless otherwise specifically authorized by the Commission.

FRISCO TRANSPORTATION COMPANY
ADOPTION NOTICE

The *Frisco Transportation Company*

hereby adopts, ratifies, and makes its own in every respect as if the same had been originally filed and posted by it, all tariffs, classifications, rules, notices, concurrences, traffic agreements, divisions, authorities, powers of attorney or other instruments whatsoever, including supplements or amendments thereto, filed with the Interstate Commerce Commission by, or heretofore adopted by Joseph Washington Parker, doing business as J. W. Parker Truck Line, prior to *May 1, 1939.*

Issued: *April 21, 1939* Effective: *May 1, 1939*

Issued under authority of Special Circular M No. 1, and in conformith with, Interstate Commerce Commission Docket No. MC-F-678

Issued By:

R. C. Bryant,
Ass't General Manager,
Springfield, Mo.

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[fol. 544] COPY

INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

January 28, 1939

Please refer to File X-650

Frisco Transportation Co.,
Room 110, Frisco Building,
Springfield, Missouri.

Gentlemen:

This will acknowledge receipt of power of attorney MFXA2 No. 2 in favor of C. E. Jackson, agent—John V. Lawrence, alternate agent. This is the first power of attorney filed by you which is numbered in your MFXA2 series.

You are advised that to each form of power of attorney filed, whether it be MFXA1, MFXA2 or MFXA3, there should be assigned a separate series of numbers. These numbers should run consecutively in the series of the issuing carrier, beginning with No. 1. No numbers should be skipped and none duplicated.

In line with the above, you should advise the Commission as to the disposition of MFXA2 No. 1. If you have assigned this number to another power of attorney issued by your company, the original thereof should be filed with the Commission at an early date. If, on the other hand, you have not assigned this number to any document which you have issued, you should advise the Commission by letter that this number will not be used.

Your attention is directed to the provisions of Rule 10 (h) of Tariff Circular MF No. 2, which require, with certain few exceptions, that the originals of all concurrences shall be forwarded direct to the Commission as soon as possible after the date of their issuance.

Very truly yours,

W. Y. Blanning, Director

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[fol. 545] COPY

FRISCO TRANSPORTATION COMPANY
Springfield, Mo.,
February 3, 1939

File FTC-A-7-T

Mr. W. Y. Blanning, Director,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Sir:

Letter January 28th, file X-650, concerning Power of Attorney MFXA 2 No. 2, in favor of C. F. Jackson.

Wish to acknowledge that through inadvertence, the Power of Attorney referred to indicated No. 2. MFXA 2 No. 1 has not been previously used and in accordance with your letter will refrain from using same at a later date.

Yours very truly,

W. L. ENGLISH
General Manager

RCB:C

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[fol. 546] COPY

J. D. HUGHETT, AGENT
MEMPHIS-ARKANSAS TARIFF
1806 SANTA FE BUILDING
DALLAS, TEXAS

June 15, 1939.

File: B-M-8

Frisco Transportation Co.
Springfield, Missouri

Gentlemen:

Referring to your letter of May 16th, under File FTC-A-7-T, and enclosing herewith a copy of our letter to the commission, which is self-explanatory.

Please change your copy of the power of attorney to Agent Hughett to read as follows:

"MFXA2 No. 4 Cancels MFXA2 No. 1 of J. W. Parker Truck Line".

It will be necessary to file a new document in the very near future naming C. O. Adams as Alternate Agent, in lieu of S. J. Cole, and you will be furnished with the proper forms in due time.

Yours very truly,

J. D. Hughett, Agent.

COA:EY C. O. Adams.

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[fol. 547] COPY

June 15, 1939

File: B-m-8

Interstate Commerce Commission
Bureau of Motor Carriers, Section of Traffic
Washington, D. C.

Gentlemen:

We enclose herewith for filing original Power of Attorney MFXA2 No. 4 in favor of Agent J. D. Hughett issued by Frisco Transportation Company, Springfield, Missouri.

You will note that this document cancels Power of Attorney MFXA2 No. 1 of Joseph Washington Parker, doing business as J. W. Parker Truck Line, Blytheville, Arkansas. The Parker Truck Line document was originally assigned Power of Attorney MFXA2 No. 7 but was later corrected to show the correct number "MFXA2 No. 1".

Yours very truly,

J. D. Hughett, Agent,

COA:FM C. O. Adams
Encl.

cc—Mr. R. C. Bryant
Frisco Transportation Co.
Springfield, Mo.
(Your File FTC-A-7-T of May 16, 1939)

[fol. 548] FRISCO TRANSPORTATION COMPANY

Springfield, Mo.,
May 29, 1939.

Mr. W. Y. Blanning, Director,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Mr. Blanning:

Your letter of May 23rd, files Finance Nos. MC-F-678 and MC-F-679, relative consummation Frisco Transportation Company purchase Joseph W. Parker and Louis Tolson.

Wish to advise at this time that the operation of these two lines was officially taken over on May 10, 1939. I am today handling with our Auditing Department to determine whether or not the journal entries have been forwarded to your office. If this has not been done, please let me assure you that it will be taken care of within the next day or two.

Yours very truly,

General Manager.

RCB:C

cc
Mr. J. F. Miller,
Director—District No. 10,
Kansas City, Missouri.

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[fol. 549] INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

June 1, 1939

Please refer to files
Finance: Nos. MC-F-678
MC-F-679

Mr. W. L. English, General Manager,
Frisco Transportation Company,
Springfield, Missouri.

Dear Mr. English:

This will acknowledge receipt of your letter of May 29th, indicating that the consummation of the transactions covered by the above-numbered finance dockets, Frisco Transportation Company—Purchase—Joseph W. Parker; Frisco Transportation Company—Purchase—Louis Tolson, was on May 10, 193[illegible], instead of May 1st, indicated to us some time ago as the anticipated date of consummation. All concerned are being asked to adjust their records accordingly.

Your cooperation in seeing that the journal entries to cover these transactions are forwarded promptly is appreciated.

Very truly yours,

W. Y. Blanning, Director

Cy—Mr. James F. Miller,
Director, District No. 10,
Kansas City, Missouri.

[fol. 550] INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

June 6, 1939

Refer to: 0-302
Docket No. MC 89913 Sub 5 & 6

Frisco Transportation Co.,
906 Olive St.,
St. Louis, Missouri.

Gentlemen:

Please be referred to the orders of the Commission entered in Nos. MC-F 678 and MC-F 679, under date of April 12, 1939.

In No. MC-F 678 you were informed that your application to purchase the operating rights of Joseph W. Parker, d/b/a J. W. Parker Truck Line, Blytheville, Arkansas, Docket No. MC 71901 had been approved. You were likewise informed that your application to purchase a portion of the operating rights of Louis Tolson, d/b/a Tolson Transfer Co., Walnut Ridge, Arkansas, Docket No. MC-383, pursuant to No. MC 679, had also been approved.

This is to advise you that Docket No. MC 89913 Sub 5 has been assigned to cover your acquisition of Docket No. MC 71901, and Docket No. MC 89913 Sub 6 has been assigned to cover that portion of Docket No. MC 383, wherein your name was substituted as applicant. Any future correspondence that you may have with this Bureau concerning these applications should refer to these Docket numbers.

Your cooperation in this matter will be appreciated.

Yours very truly,

W. Y. Blanning, Director

CC District Director Miller

[fol. 551] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C.

on the 16th day of June, A. D. 1939

No. MC 89913 Sub 5*

APPLICATION OF FRISCO TRANSPORTATION COMPANY, ST. LOUIS, MISSOURI

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity to applicant's predecessor in interest upon compliance with the terms of said order; that the purchase of the operations herein involved having been approved and authorized, as provided in Section 213 of the Motor Carrier Act, 1935; and that further consideration having been had;

It further appearing, That applicant or predecessor in interest was on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specifications *set forth as appended on reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the Motor Carrier Act, 1935, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public,* a certificate of public convenience and necessity shall be issued, unless otherwise ordered, and authorizing said applicant to engage in interstate or foreign commerce as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, and unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order,* then said applicant shall show cause, if any there be, *within 60 days from the date of this order,* why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That the previous order entered in this proceeding describing the authority to which applicant's predecessor in interest has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(Seal)

11

[fol. 552] Appendix to the order of the Interstate Commerce Commission, Division 5, dated the 16th day of June, A. D. 1939

No. MC 89913 Sub 5*

Application of Frisco Transportation Company, a Corporation, St. Louis, Missouri

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of the commodities indicated, over the regular route, between fixed termini, and to and from intermediate and off-route points, is as specified below:

Commodities generally, except those of unusual value, and except high explosives, household goods (when transported as a separate and distinct service in connection with so-called "household movings"), commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Blytheville, Ark., and Memphis, Tenn.:

From Blytheville over U. S. Highway 61 to Memphis, and return over the same route.

All intermediate points.

Off-route points; Armorel, Dyess, Keiser, Marie, and Victoria, Ark.

*This order embraces the operations purchased by the above named applicant from Joseph W. Parker, doing business as J. W. Parker, doing business as J. W. Parker Truck Line, Blytheville, Ark., Docket No. MC 71901, pursuant to No. MC-F-678, approved April 12, 1939.

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[fol. 553] This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

No. MC-89913 (Sub-No. 11)

FRISCO TRANSPORTATION COMPANY
COMMON CARRIER APPLICATION

(41 M.C.C. 865)

Submitted February 3, 1942 *Decided October 30, 1942*

Applicant found entitled to continue operation, subject to certain conditions, as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, with certain exceptions, between East St. Louis, Ill., and Cabool, Mo., and between Springfield, Mo., and Hoxie, Ark., over specified routes, serving certain intermediate

and off-route points by reason of such operations having been performed by applicant or its predecessors in interest on and continuously since June 1, 1935. Issuance of a certificate, subject to conditions, approved upon compliance by applicant with certain requirements, and applications in all other respects denied.

William W. Dalton and *N. S. Sherman* for applicant.
George W. Holmes, John S. Mosby, H. C. Smiley, A. E. O'Hara, Lee Reeder, and *James W. Wrape* for protestants.

REPORT OF THE COMMISSION

DIVISION 5, COMMISSIONERS MAHAFFIE, ROGERS, AND PATTERSON

BY DIVISION 5:

* * * * * * *

In *Frisco Transp. Co.—Purchase—Reddish,* 35 M.C.C. 132, decided February 5, 1940, the Commission, division 4, authorized the purchase by Frisco Transportation Company of the property and operating rights of Reddish,[2] provided, among other things, that any operating authority granted shall be modified by excluding therefrom (a) all irregular-

[fol. 554] route operating rights and (b) all rights to render service from or to, or interchange traffic at, any point which is not a station on the rail lines of the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, Trustees) if such a point is more than 10 miles by highway from such a station, except as to routes between Rolla and Cabool, Mo., between Salem, Mo., on the one hand, and Rolla and Licking, Mo., on the other, between Mammoth Spring and Batesville, Ark., and between Salem and Hardy, Ark. No. MC-89913 (Sub-No. 11) has been assigned to cover the described operations purchased by Frisco Transportation Company.

(Sheets 2 and 3)

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[2] Covered by No. MC-13880, filed by Reddish, and Nos. MC-70463 and MC-37905, filed by Renfrow and Williams, respectively.

* * * * * * *

We come now to protestants' Exceptions. They contend the examiner erred in failing to give effect to a written stipulation, filed of record, between counsel for protestants and counsel for applicant, in which the parties agreed that any certificate issued to applicant by reason of the applications here involved shall be restricted so as to prohibit the transportation of shipments by applicant by motor vehicle between St. Louis and Memphis, or to or through or from more than one of said points. In reply applicant contends the examiner did in effect so restrict applicant because he did not recommend a grant of authority to applicant south of Jonesboro, Ark. Applicant's contention lacks substance. Operations south of Jonesboro were not included by the examiner because, as stated in his report, it would duplicate an operation acquired by applicant from Blake, also authorized in *Frisco Transp. Co.—Purchase—Reddish, supra.* The obvious purpose of the stipulation was to prevent applicant from utilizing any routes authorized for the purpose of transporting shipments by motor vehicle the entire distance between St. Louis and Memphis. The stipulation so shows on its face and such a restriction will be imposed in the certificate hereinafter authorized.

Protestants also contend that applicant is not entitled to "grandfather" operating rights over U. S. Highway 63 south of Hardy, Ark. They claim the only service shown on or prior to the "grandfather" date to points on this highway south of Hardy consisted of two shipments of coffee from Springfield to Jonesboro on January 15, 1935, listed on separate exhibits and evidently being the same shipment. Protestants' contention is not well founded. As before stated, applicant holds operating rights between Memphis and Jonesboro by reason of the Blake purchase. It also holds operating rights between Jonesboro and Hoxie, Ark., over U. S. Highway 63 by reason of purchase from Louis Tolson. See *Frisco Transp. Co.—Purchase—Parker,* 25 M.C.C. 96. Renfrow testified he operated over this route to and from Memphis on and prior to the "grandfather" date, and he submitted schedules showing a number of

[fol. 555] interstate shipments transported to intermediate points between Hardy and Hoxie both prior and subsequent to June 1, 1935. It follows that applicant is entitled to operating rights over this route as far south as Hoxie there connecting with its previously-acquired operating rights south thereof into Memphis.

(Sheet 5)

• • • • • • •

We find that applicant's predecessors in interest were on June 1, 1935, and that applicant and its predecessors in interest have been continuously since that time, engaged in bona fide operation as a common carrier by motor vehicle of general commodities, except dangerous explosives, inflammable liquids, livestock, commodities in bulk, currency, bullion, commodities requiring special equipment, and household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, between the points and over the routes shown in appendix B; and that applicant is entitled to a certificate authorizing continuance of such operation subject to the following conditions, and that the applications in all other respects should be denied:

1. Applicant shall not serve any point which is not a station on the rail lines of the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, Trustees) if such point is more than 10 miles by highway from such a station.

2. No shipments shall be transported by applicant between St. Louis, Mo., and Memphis, Tenn., or to or through or from more than one of said points over the routes herein authorized.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act and our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the applications except to the extent operations are authorized by the certificate herein granted.

(Sheet 6)

[fol. 556] APPENDIX B

Route 1. Between East St. Louis, Ill., and Cabool, Mo.:

(a) From East St. Louis over City U. S. Highway 66 to St. Louis, Mo., thence over U. S. Highway 66 to Rolla, Mo., and thence over U. S. Highway 63 to Cabool or

(b) From East St. Louis over U. S. Highway 50 to Gray Summit, Mo., thence over U. S. Highway 66 to Rolla, and thence over U. S. Highway 63 to Cabool;

and return over the same routes

Intermediate point: St. Louis, Mo.

Route 2. Between Springfield, Mo., and Hoxie, Ark.:

From Springfield over U. S. Highway 60 to Cabool, Mo., thence over U. S. Highway 63 to Hoxie; and return over the same route.

Service at all intermediate points.

Off-route point: Black Rock, Ark.

[fol. 557] EXHIBIT No. 14-A

No. MC-89913 Sub 6—Memphis-Walnut Ridge

MC-F-679

FTC—Purchase—Louis Tolson

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CERTIFICATES ISSUED:
April 18, 1942
July 16, 1943
December 20, 1943

For Complete Copies
See Exhibit No. 16-A

1

[fol. 558] COPY

INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

May 16, 1939

Please refer to file
K-303—K-305

Mr. R. C. Bryant, Ass't General Mgr
Frisco Transportation Company,
Springfield, Missouri,

Dear Mr. Bryant:

Under dates of April 24, 1939, and April 26, 1939 respectively, the Commission received for filing copies of

your adoption notice MF-I.C.C. No. 5 and Adoption Supplement No. 1 to MF-I.C.C. No. 1 (Louis Tolson).

These adoption publications purport to completely adopt the tariffs, etc., of the selling carrier. In the Commission's Order of April 12, 1939, in No. MC-F-679, you were authorized to purchase a portion of the operating rights of the selling carrier and your adoption publications, therefore, should have the effect of adopting for your account tariffs, etc., of the selling carrier, insofar as they contain rates, rules, and regulations applying in connection with the transferred operations. Therefore, the publications referred to in the first paragraph above may not be accepted for filing and are accordingly rejected and the three copies of each tendered for filing are returned to you herewith.

It will be necessary for you to issue, file with this Commission, and post for public inspection an adoption notice to be issued in lieu of the rejected publication. To assist you in the preparation of this adoption notice, I enclose herewith a specimen. If you will follow closely the form and wording of this specimen, your adoption notice should be properly prepared.

A copy of your adoption notice should be furnished each agent issuing tariffs in which the selling carrier is shown as a participating carrier.

As Tolson Transfer Co., MF-I.C.C. No. 1, contains rates, rules and regulations applying in connection with both the transferred operations and the operations which were retained, it will be necessary for the selling carrier to issue a supplement to this tariff, adding your name thereto as a participating carrier. As authority for such participation you must issue a concurrence in favor of the selling carrier in the form and manner outlined in Rule 11 of Tariff Circular MF No. 2.

2

[fol. 559] Rates, rules and regulations applying locally between points on the transferred portion of the route should be transferred as quickly as possible from the tariff of the selling carrier to a tariff or tariffs of the purchasing carrier. The selling carrier should cancel such rates, rules,

and regulations from its tariff on statutory notice, and should refer by MF-I.C.C. number to the tariff or tariffs of the purchasing carrier for rates to apply thereafter. The purchasing carrier should publish and file corresponding rates, rules and regulations on statutory notice to become effective upon the date upon which the cancelation of the old carrier's rates, rules and regulations become effective.

I trust that you will give this matter your prompt attention. If you desire additional information please feel free to communicate with this office.

Very truly yours,

W. Y. BLANNING, Director

CC: Mr. James F. Miller
District Director
Bureau of Motor Carriers,
Carbide & Carbon Bldg.,
912 Baltimore Avenue,
Kansas City, Missouri.

Enclosures

CC: Mr. Louis Tolson,
Tolson Transfer Co.
Walnut Ridge, Arkansas.

3

[fol. 560] COPY

FRISCO TRANSPORTATION COMPANY

Springfield, Mo.,
May 22, 1939

File FTC-A-7-T

Mr. W. Y. Blanning, Director,
Bureau of Motor Carriers,
Interstate Commerce Commission,
Washington, D. C.

Dear Mr. Blanning:

Please refer to your file X-303, X-305 under date of May 16th, in connection with filing Adoption Supplement No. 1

to MF-I.C.C. No. 1, Louis Tolson, doing business as Tolson Transfer.

In accordance with the specimen which accompanied your letter, there is attached three copies of Frisco Transportation Company Adoption Notice MF-I.C.C. No. 7, issued in lieu of MF-I.C.C. No. 5, rejected by the Commission.

In accordance with your instructions, have prepared Concurrence, MFXC 2 No. 1, which is being mailed to our St. Louis Office for signature of Vice-President and to be attested to by Secretary. This instrument will be sent to Mr. Louis Tolson for transmittal to you, along with Supplement to his tariff No. 1, I.C.C. No. 1.

You will note in our Adoption Notice, page 2, description of points and routes have been changed to include Hoxie, Arkansas, a point which we are authorized to serve under our Order from the Commission. Note Hoxie, Arkansas, was not included in specimen.

Yours very truly,

R. C. Bryant

JT:C

c.c.
Mr. J. F. Miller

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[fol. 561] No Supplement to this tariff will be issued except for the purpose of cancelling the tariff, unless otherwise specifically authorized by the Commission.

MF-I.C.C. No. 7 (Issued in lieu of MF-I.C.C. No. 5, rejected by the Interstate Commerce Commission)

FRISCO TRANSPORTATION COMPANY
ADOPTION NOTICE

The Frisco Transportation Company

hereby adopts, ratifies, and makes its own in every respect as if the same had been originally filed and posted by it, all tariffs, classifications, rules, notices,

concurrences, traffic agreements, divisions, authorities, powers of attorney or other instruments whatsoever, including supplements or amendments thereto, filed with the Interstate Commerce Commission by, or heretofore adopted by Louis Tolson, doing business as Tolson Transfer, prior to *May 10, 1939,* insofar as said instruments apply *from, to, between or via points,* and over routes as described on Page 2, hereof. (See Note).

Note: This adoption notice does not have the effect of eliminating a route extending from Hoxie, Arkansas, to Walnut Ridge, Arkansas, via U. S. Highway 67, as a route served by Louis Tolson, doing business as Tolson Transfer, but has the effect of establishing service over such route by Frisco Transportation Company.

ISSUED: *May 22, 1939* EFFECTIVE: *May 10, 1939*

Issued under authority of Special Circular M No. 1 and in conformity with Interstate Commerce Commission Docket No. *MC-F-679.*

Issued by

R. C. Bryant,
Asst. General Manager
Springfield, Mo.

5

[fol. 562] DESCRIPTION OF POINTS AND ROUTES

Between Walnut Ridge, Arkansas, Hoxie, Arkansas and Memphis, Tennessee, as follows:

From, and including Walnut Ridge, over U.S. Highway 67 to and including Hoxie, Arkansas, thence over U.S. Highway 63 to Turrell, Arkansas, thence over U.S. Highway 61 to, and including Memphis. Return over same route.

Intermediate points served:

All points between Walnut Ridge and Marked Tree, Arkansas, for the transportation of Soap and Soap Products, only.

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[fol. 563] COPY

INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

January 28, 1939

Please refer to File X-650

Frisco Transportation Co.,
Room 110, Frisco Building,
Springfield, Missouri.

Gentlemen:

This will acknowledge receipt of power of attorney MFXA2 No. 2 in favor of C. E. Jackson, agent—John V. Lawrence, alternate agent. This is the first power of attorney filed by you which is numbered in your MFXA2 series.

You are advised that to each form of power of attorney filed, whether it be MFXA1, MFXA2 or MFXA3, there should be assigned a separate series of numbers. These numbers should run consecutively in the series of the issuing carrier, beginning with No. 1. No numbers should be skipped and none duplicated.

In line with the above, you should advise the Commission as to the disposition of MFXA2 No. 1. If you have assigned this number to another power of attorney issued by your company, the original thereof should be filed with the Commission at an early date. If, on the other hand, you have not assigned this number to any document which you have issued, you should advise the Commission by letter that this number will not be used.

Your attention is directed to the provisions of Rule 10 (h) of Tariff Circular MF No. 2, which require, with certain few exceptions, that the originals of all concurrences shall be forwarded direct to the Commission as soon as possible after the date of their issuance.

Very truly yours,

W. Y. Blanning, Director

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[fol. 564] COPY

FRISCO TRANSPORTATION COMPANY
Springfield, Mo.,
February 3, 1939

File FTC-A-7-T

Mr. W. Y. Blanning, Director,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Sir:

Letter January 28th, file X-650, concerning Power of Attorney MFXA 2 No. 2, in favor of C. F. Jackson.

Wish to acknowledge that through inadvertence, the Power of Attorney referred to indicated No. 2. MFXA 2 No. 1 has not been previously used and in accordance with your letter will refrain from using same at a later date.

Yours very truly,

W. L. ENGLISH
General Manager

RCB:C

8

[fol. 565] CONCURRENCE

MFXC 2 No. 1
Cancels MFXC—— No.——.

Frisco Transportation Company,
Room 110, Frisco Building,
Springfield, Missouri,
May 22, 1939.

To The Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

This is to certify that Frisco Transportation Company assents to and concurs in the publication and filing of the freight rate tariff described below, filed by Louis Tolson, doing business as Tolson Transfer, together with supple-

ments thereto and successive issues thereof, and that such concurring carrier hereby makes itself a party thereto and bound thereby, insofar as such tariff names rates between points on the lines on routes of Tolson Transfer, on the one hand and points on the line or routes of Frisco Transportation Company, on the other; on rates between points on the lines or routes of Tolson Transfer on the one hand, and points on the lines or routes of other carriers parties to such tariff, on the other, in connection with which Frisco Transportation Company acts as intermediate line, until this authority is revoked by formal and official notice of revocation filed with the Interstate Commerce Commission and sent to the carrier to which this concurrence is given.

Tolson Transfer Motor Freight Tariff No. 1 MF-I.C.C. No. 1 naming rates on classes and commodities between Memphis, Tennessee and points in Arkansas named therein, issued July 15, 1938, effective August 22, 1938. Issued by Louis Tolson, Owner, Tolson Transfer, Walnut Ridge, Arkansas.

FRISCO TRANSPORTATION COMPANY

BY J. R. Koontz
Vice-President.

Attested: L. O. Williams
Secretary

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[fol. 566] COPY

INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

August 14, 1939

Please refer to file
X-650—100284

Mr. R. C. Bryant, Asst. Gen. Mgr.,
Frisco Transportation Company,
Frisco Bldg.,
Springfield, Mo.

Dear Mr. Bryant:

This will acknowledge receipt of your letter dated July 26, 1939, your file T 3-T in connection with the revocation

notice issued by your company July 14, 1939 directed against MFXC2 No. 1 in favor of Louis Tolson doing business as Tolson Transfer.

This revocation notice was received by the Commission on July 27, 1939, and will become effective September 25, 1939. In the future please be sure that all revocation notices filed by you bear an effective date which will be at least sixty days from the date of their receipt by the Commission.

Very truly yours,

W. Y. Blanning, Director.

Copy to:

Mr. Louis Tolson,
Tolson Transfer,
Walnut Ridge, Ark.

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[fol. 567] COPY

INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

September 12, 1939

Please refer to file
X-305-X-302

Mr. Louis Tolson
Tolson Transfer Co.
Walnut Ridge, Arkansas.

Dear Mr. Tolson:

On August 23, 1939, the Commission received for filing three copies of your supplement designated as Supplement No. 3 to MF-I.C.C. No. 1 bearing an effective date of September 20, 1939.

Rule 1(b) of the Commission's Tariff Circular MF No. 2 provides that all tariffs and supplements must be filed with

the Interstate Commerce Commission in Washington D. C. at least thirty days prior to the effective date thereof, unless otherwise authorized by the Commission. Since the aforementioned supplement fails to meet this requirement, it cannot be accepted by the Commission for filing; accordingly, it is hereby rejected by the Commission, and the copies thereof received for filing are returned herewith to you.

Since your operating rights between Memphis, Tennessee, and Walnut Ridge, Arkansas, were transferred to Frisco Transportation Company, the rates appearing on Page 10 of your MF-I.C.C. No. 1 serve no further useful purpose. Only the rates appearing in Items 9 and 10 on Page 9 of the tariff can be used by you. Item 10 does not name any commodities on which the rate of 18 applies.

In view of the facts stated in the next preceding paragraph, it is suggested that you issue a new tariff naming such rates as may be needed by you for the transportation of property in interstate or foreign commerce and thereby direct the cancelation of MF-I.C.C. No. 1. The new tariff should state that the rates published in MF-I.C.C. No. 1 for the account of Frisco Transportation Company, which are not brought forward, will be found in Memphis-Arkansas Tariff No. 1 J. D. Hughett's MF-I.C.C. No. 32 and effective supplements thereto. The name of your company should be shown on such new tariff as follows:

Louis Tolson
doing business as
Tolson Transfer Co.

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[fol. 568] You will observe that the supplement hereby rejected does not show the abbreviation "Co." as a part of your name.

If you desire additional information in connection with the contents of this letter, please feel free to communicate with this office.

Very truly yours,

W. Y. Blanning, Director

Enclosures
174713

CC: Mr. Ray G. Atherton
District Director
Bureau of Motor Carriers
Interstate Commerce Commission
906 Wallace Building
Little Rock, Ark.

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[fol. 569] FRISCO TRANSPORTATION COMPANY
Springfield, Mo.,
May 29, 1939.

Mr. W. Y. Blanning, Director,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Mr. Blanning:

Your letter of May 23rd, files Finance Nos. MC-F-678 and MC-F-679, relative consummation Frisco Transportation Company purchase Joseph W. Parker and Louis Tolson.

Wish to advise at this time that the operation of these two lines was officially taken over on May 10, 1939. I am today handling with our Auditing Department to determine whether or not the journal entries have been forwarded to your office. If this has not been done, please let me assure you that it will be taken care of within the next day or two.

Yours very truly,

RCB:C

General Manager.

cc
Mr. J. F. Miller,
Director—District No. 10,
Kansas City, Missouri.

13

[fol. 570] INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

June 1, 1939

Please refer to files
Finance: Nos. MC-F-678
MC-F-679

Mr. W. L. English, General Manager,
Frisco Transportation Company,
Springfield, Missouri.

Dear Mr. English:

This will acknowledge receipt of your letter of May 29th, indicating that the consummation of the transactions covered by the above-numbered finance dockets, Frisco Transporation Company—Purchase—Joseph W. Parker; Frisco Transportation Company—Purchase—Louis Tolson, was on May 10, 1939, instead of May 1st, indicated to us some time ago as the anticipated date of consummation. All concerned are being asked to adjust their records accordingly.

Your cooperation in seeing that the journal entries to cover these transactions are forwarded promptly is appreciated.

Very truly yours,

W. Y. Blanning, Director

Cy—Mr. James F. Miller,
Director, District No. 10,
Kansas City, Missouri.

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[fol. 571] INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

June 6, 1939
Refer to: 0-302
Docket No. MC 89913 Sub 5 & 6

Frisco Transportation Co.,
906 Olive St.,
St. Louis, Missouri.

Gentlemen:

Please be referred to the orders of the Commission entered in Nos. MC-F 678 and MC-F 679, under date of April 12, 1939.

In No. MC-F 678 you were informed that your application to purchase the operating rights of Joseph W. Parker, d/b/a J. W. Parker Truck Line, Blytheville, Arkansas, Docket No. MC 71901 had been approved. You were likewise informed that your application to purchase a portion of the operating rights of Louis Tolson, d/b/a Tolson Transfer Co., Walnut Ridge, Arkansas, Docket No. MC 383, pursuant to No. MC 679, had also been approved.

This is to advise you that Docket No. MC 89913 Sub 5 has been assigned to cover your acquisition of Docket No. MC 71901, and Docket No. MC 89913 Sub 6 has been assigned to cover that portion of Docket No. MC 383, wherein your name was substituted as applicant. Any future correspondence that you may have with this Bureau concerning these applications should refer to these Docket numbers.

Your cooperation in this matter will be appreciated.

Yours very truly,

W. Y. Blanning, Director

CC District Director Miller

[fol. 572] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C. on the

10th day of July, A. D. 1939

No. MC 89913 Sub. 6*

APPLICATION OF FRISCO TRANSPORTATION COMPANY, A CORPORATION, ST. LOUIS, MISSOURI.

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity to applicant's predecessor in interest upon compliance with the terms of said order; that the purchase of the operations herein involved having been approved and authorized, as provided in Section 213 of the Motor Carrier Act, 1935; and that further consideration having been had;

It further appearing, That applicant or predecessor in interest was, on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the Motor Carrier Act, 1935, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public,* a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, and unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order,* then said applicant shall show cause, if any there be, *within 60 days from the date of this order,* why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That the previous order entered in this proceeding describing the authority to which applicant's predecessor in interest has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

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[fol. 573] Appendix to the order of the INTERSTATE COMMERCE COMMISSION, Division 5, dated the 10th day of July, A. D. 1939

No. MC 89913 Sub. 6*

APPLICATION OF FRISCO TRANSPORTATION COMPANY, A CORPORATION, ST. LOUIS, MISSOURI

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of the commodities indicated, over the regular route, between fixed termini, and to and from intermediate points, is as specified below:

Commodities generally, except those of unusual value, and except high explosives, household goods (when transported as a separate and distinct service in connection with so-called "household movings"), commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Walnut Ridge, Ark., and Memphis, Tenn.:

From Walnut Ridge over U. S. Highway 67 to Hoxie, Ark., thence over U. S. Highway 63 to Turrell, Ark., and thence over U. S. Highway 61 to Memphis, and return over the same route.

Intermediate points: Marked Tree, Ark., and those between Marked Tree and Walnut Ridge, for soap and soap products southbound only.

• This order embraces that portion of the operations of Louis Tolson, doing business as Tolson Transfer Co., Docket No. MC 383, which was purchased by the applicant named herein pursuant to No. MC-F-679, approved April 12, 1939.

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[fol. 574] This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

No. MC-89913 (Sub-No. 11)

FRISCO TRANSPORTATION COMPANY
COMMON CARRIER APPLICATION

(41 M.C.C. 865)

Submitted February 3, 1942. *Decided October 30, 1942*

Applicant found entitled to continue operation, subject to certain conditions, as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, with certain exceptions, between East St. Louis, Ill., and Cabool, Mo., and between Springfield, Mo., and

Hoxie, Ark., over specified routes, serving certain intermediate and off-route points by reason of such operations having been performed by applicant or its predecessors in interest on and continuously since June 1, 1935. Issuance of a certificate, subject to conditions, approved upon compliance by applicant with certain requirements, and applications in all other respects denied.

William W. Dalton and *N. S. Sherman* for applicant.

George W. Holmes, John S. Mosby, H. C. Smiley, A. E. O'Hara, Lee Reeder, and *James W. Wrape* for protestants.

REPORT OF THE COMMISSION

DIVISION 5, COMMISSIONERS MAHAFFIE, ROGERS, AND PATTERSON

BY DIVISION 5:

* * * * * * *

In *Frisco Transp. Co.—Purchase—Reddish,* 35 M.C.C. 132, decided February 5, 1940, the Commission, division 4, authorized the purchase by Frisco Transportation Company of the property and operating rights of Reddish,[2] provided, among other things, that any operating authority granted shall be modified by excluding therefrom (a) all irregular-route operating rights and (b) all rights to ren-

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[fol. 575] der service from or to, or interchange traffic at, any point which is not a station on the rail lines of the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, Trustees) if such a point is more than 10 miles by highway from such a station, except as to routes between Rolla and Cabool, Mo., between Salem, Mo., on the one hand, and Rolla and Licking, Mo., on the other, between Mammoth Spring and Batesville, Ark., and between Salem and Hardy, Ark. No. MC-89913 (Sub-No.

[2] Covered by No. MC-13880, filed by Reddish, and Nos. MC-70463 and MC-37905, filed by Renfrow and Williams, respectively.

11) has been assigned to cover the described operations purchased by Frisco Transportation Company.

(Sheets 2 and 3)

* * * * * * *

We come now to protestants' Exceptions. They contend the examiner erred in failing to give effect to a written stipulation, filed of record, between counsel for protestants and counsel for applicant, in which the parties agreed that any certificate issued to applicant by reason of the applications here involved shall be restricted so as to prohibit the transportation of shipments by applicant by motor vehicle between St. Louis and Memphis, or to or through or from more than one of said points. In reply applicant contends the examiner did in effect so restrict applicant because he did not recommend a grant of authority to applicant south of Jonesboro, Ark. Applicant's contention lacks substance. Operations south of Jonesboro were not included by the examiner because, as stated in his report, it would duplicate an operation acquired by applicant from Blake, also authorized in *Frisco Transp. Co.—Purchase—Reddish, supra.* The obvious purpose of the stipulation was to prevent applicant from utilizing any routes authorized for the purpose of transporting shipments by motor vehicle the entire distance between St. Louis and Memphis. The stipulation so shows on its face and such a restriction will be imposed in the certificate hereinafter authorized.

Protestants also contend that applicant is not entitled to "grandfather" operating rights over U. S. Highway 63 south of Hardy, Ark. They claim the only service shown on or prior to the "grandfather" date to points on this highway south of Hardy consisted of two shipments of coffee from Springfield to Jonesboro on January 15, 1935, listed on separate exhibits and evidently being the same shipment. Protestants' contention is not well founded. As before stated, applicant holds operating rights between Memphis and Jonesboro by reason of the Blake purchase. It also holds operating rights between Jonesboro and Hoxie, Ark., over U. S. Highway 63 by reason of purchase from Louis Tolson. See *Frisco Transp. Co.—Purchase—Parker,* 25 M.C.C. 96. Renfrow testified he operated over this route to

and from Memphis on and prior to the "grandfather" date, and he submitted schedules showing a number of interstate

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[fol. 576] shipments transported to intermediate points between Hardy and Hoxie both prior and subsequent to June 1, 1935. It follows that applicant is entitled to operating rights over this route as far south as Hoxie there connecting with its previously-acquired operating rights south thereof into Memphis.

(Sheet 5)

* * * * * * *

We find that applicant's predecessors in interest were on June 1, 1935, and that applicant and its predecessors in interest have been continuously since that time, engaged in bona fide operation as a common carrier by motor vehicle of general commodities, except dangerous explosives, inflammable liquids, livestock, commodities in bulk, currency, bullion, commodities requiring special equipment, and household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, between the points and over the routes shown in appendix B; and that applicant is entitled to a certificate authorizing continuance of such operation subject to the following conditions, and that the applications in all other respects should be denied:

1. Applicant shall not serve any point which is not a station on the rail lines of the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, Trustees) if such point is more than 10 miles by highway from such a station.

2. No shipments shall be transported by applicant between St. Louis, Mo., and Memphis, Tenn., or to or through or from more than one of said points over the routes herein authorized.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act and our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the applications except to the

exten. operations are authorized by the certificate herein granted.

(Sheet 6)

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[fol. 577] APPENDIX B

Route 1. Between East St. Louis, Ill., and Cabool, Mo.:

(a) From East St. Louis over City U. S. Highway 66 to St. Louis, Mo., thence over U. S. Highway 66 to Rolla, Mo., and thence over U. S. Highway 63 to Cabool or

(b) From East St. Louis over U. S. Highway 50 to Gray Summit, Mo., thence over U. S. Highway 66 to Rolla, and thence over U. S. Highway 63 to Cabool;

and return over the same routes

Intermediate point: St. Louis, Mo.

Route 2. Between Springfield, Mo., and Hoxie, Ark.:

From Springfield over U. S. Highway 60 to Cabool, Mo., thence over U. S. Highway 63 to Hoxie; and return over the same route.

Service at all intermediate points.

Off-route point: Black Rock, Ark.

[fol. 578] EXHIBIT No. 15-A

No. MC-89913 Sub 10—Blytheville-Lake City

MC-F-1037

FTC—Purchase—T. N. Bennett

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CERTIFICATES ISSUED:
June 13, 1940
July 16, 1943
December 20, 1943

For Complete Copies
See Exhibit No. 16-A

1

[fol. 579] COPY

INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS
WASHINGTON

April 5, 1940

Please refer to file
X-303

Mr. T. N. Bennett
Bennett Truck Line
Paragould, Arkansas.

Dear Mr. Bennett:

This has reference to the commission's order effective March 15, 1940, Docket No. MC-F-1037, in which the Commission approved and authorized the purchase by Frisco Transportation Company of certain operating rights of T. N. Bennett, doing business as Bennett Truck Line.

Frisco Transportation Company has filed its adoption notice, MF-I.C.C. No. 15, announcing the adoption of your tariffs, insofar as they contain rates and provisions applying in connection with the transferred operations. There is on file with the Commission for your account Local Motor Freight Tariff No. 3, MF-I.C.C. No. 3, which appears to contain rates and provisions applying in connection with the transferred operations. In accordance with this Commission's Special Circular M No. 1, you are required to issue a supplement to this tariff, adding the name of Frisco Transportation Company as a participating carrier. To assist you in the preparation of this supplement, I enclose herewith a specimen. Please follow the exact form and wording of this specimen, except as otherwise indicated, and forward three copies to the Commission for filing.

Rates, etc., applying locally in connection with the transferred operations should be transferred as quickly as possible from your tariff to a tariff of the purchasing carrier.

You should cancel such rates, etc., from your tariff on statutory notice and refer by MF-I.C.C. number to the tariff of the purchasing carrier for rates to apply thereafter.

I trust that this fully informs you with regard to this matter and that it will receive your immediate attention. If you desire additional information, please feel free to communicate with this office.

Very truly yours,

W. Y. Blanning, Director

Enclosure

cc—Mr. R. C. Bryant, Asst. Gen.
Mgr. Fristo Transportation
Co. Springfield, Mo.

You will observe from the foregoing that the selling carrier is being requested to issue a supplement to its tariff, MF-I.C.C. No. 3, for the purpose of adding your name as a participating carrier. As authority for such participation,

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[fol. 580] it will be necessary for you to issue a concurrence in favor of the selling carrier in the form and manner outlined in Rule 11 of Tariff Circular MF No. 2. This concurrence should bear your next unused MFXC2 number, presumably MFXC2. You will also observe that the selling carrier has been instructed to cancel from its tariff rates which apply locally in connection with the transferred operations. You should publish corresponding rates to cover these operations to become effective on the date on which the cancelation of the rates in the selling carrier's tariff is effective. It is suggested that you confer with the selling carrier in these matters.

CC—Mr. Ray G. Atherton
District Director
Bureau of Motor Carriers
Interstate Commerce Commission
906 Wallace Building
Little Rock, Arkansas.

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[fol. 581] MF-I.C.C. No. 15

No supplement to this tariff will be issued except for the purpose of cancelling the tariff, unless otherwise specifically authorized by the Commission.

FRISCO TRANSPORTATION COMPANY

Adoption Notice

The Frisco Transportation Company hereby adopts, ratifies and makes its own in every respect as if the same had been originally filed and posted by it, all tariffs, classifications, rules, notices, concurrences, traffic agreements, divisions, authorities, powers of attorney, or other instruments whatsoever including supplements or amendments thereto, filed with the Interstate Commerce Commission by, or heretofore adopted by T. N. Bennett, d/b/a Bennett Truck Lines prior to March 25, 1940 insofar as said instruments apply from, to, between or via points, and over routes as described on Page 2 hereof.

Issued March 23, 1940 Effective March 25, 1940

Issued under authority of Special Circular M No. 1 and in conformity with Interstate Commerce Commission Docket No. MC-F 1037.

Issued by

R. C. Bryant,
Asst. General Manager
Springfield, Missouri

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[fol. 582] Description of Points and Routes

Between Lake City, Arkansas, and Blytheville, Ark.

From, and including Lake City, Arkansas over Arkansas State Highway 18 to, and including Blytheville, Arkansas. Returning over same route.

Intermediate points served.

All points as follows: Poplar Ridge, Black Oak, Monette, Delfore, Leachville, Brown, Manilla, Big Lake, Pettyville, Roseland, Shonyo, Wilson Junction, Dell, Dearman, Roads, Chickasawba.

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[fol. 583] COPY

INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

January 28, 1939

Please refer to File X-650

Frisco Transportation Co.,
Room 110, Frisco Building,
Springfield, Missouri.

Gentlemen:

This will acknowledge receipt of power of attorney MFXA2 No. 2 in favor of C. E. Jackson, agent—John V. Lawrence, alternate agent. This is the first power of attorney filed by you which is numbered in your MFXA2 series.

You are advised that to each form of power of attorney filed, whether it be MFXA1, MFXA2 or MFXA3, there should be assigned a separate series of numbers. These numbers should run consecutively in the series of the issuing carrier, beginning with No. 1. No numbers should be skipped and none duplicated.

In line with the above, you should advise the Commission as to the disposition of MFXA2 No. 1. If you have assigned this number to another power of attorney issued by your company, the original thereof should be filed with the Commission at an early date. If, on the other hand, you have not assigned this number to any document which you have

issued, you should advise the Commission by letter that this number will not be used.

Your attention is directed to the provisions of Rule 10 (h) of Tariff Circular MF No. 2, which require, with certain few exceptions, that the originals of all concurrences shall be forwarded direct to the Commission as soon as possible after the date of their issuance.

Very truly yours,

W. Y. Blanning, Director

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[fol. 584] COPY

FRISCO TRANSPORTATION COMPANY
Springfield, Mo.,
February 3, 1939

File FTC-A-7-T

Mr. W. Y. Blanning, Director,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Sir:

Letter January 28th, file X-650, concerning Power of Attorney MFXA 2 No. 2, in favor of C. F. Jackson.

Wish to acknowledge that through inadvertence, the Power of Attorney referred to indicated No. 2. MFXA 2 No. 1 has not been previously used and in accordance with your letter will refrain from using same at a later date.

Yours very truly,

W. L. ENGLISH
General Manager

RCB:C

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[fol. 585] CONCURRENCE

MFXC 2 No. 2
Cancels MFXC .... No. ....

Frisco Transportation Company,
Room 110, Frisco Building,
Springfield, Missouri
June 7, 1940.

To the Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

This is to certify that Frisco Transportation Company assents to and concurs in the publication and filing of the freight rate tariff described below, filed by T. N. Bennett, doing business as Bennett Truck Line, together with supplements thereto and successive issues thereof, and that such concurring carrier hereby makes itself a party thereto and bound thereby, insofar as such tariff names rates between points on the lines or routes of Bennett Truck Line on the one hand, and points on the lines or routes of Frisco Transportation Company, on the other; on rates between points on the lines or routes of Bennett Truck Line on the one hand, and points on the lines or routes of other Carriers parties to such tariff, on the other, in connection with which Frisco Transportation Company acts as intermediate line, until this authority is revoked by formal and official notice of revocation filed with the Interstate Commerce Commission and sent to the carrier to which this concurrence is given.

T. N. Bennett, doing business as, Bennett Truck Line/ Motor Freight Tariff No. 3, I.C.C. No. 1 MF-I.C.C. No. 3, naming rates on cotton between points in Arkansas, issued September 1, 1939, Effective October 5, 1939. Issued by

T. N. Bennett, Owner Bennett Truck Line, Paragould, Arkansas.

FRISCO TRANSPORTATION COMPANY.

By.....
Vice-President

Attest:

.....
Secretary

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[fol. 586] FRISCO TRANSPORTATION COMPANY
Springfield, Missouri
September 7, 1940

Mr. W. Y. Blanning, Director
Bureau of Motor Carriers,
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

Enclosed herewith please find Frisco Transportation Company, Revocation Notice of Concurrence MFXC2 No. 2 in favor of T. N. Bennett, doing business as the Bennett Truck Line issued to become effective November 7, 1940.

Mr. T. N. Bennett is being supplied with counterpart copy of this notice by copy of this letter.

Will appreciate your acknowledging receipt of the attached on duplicate copy of letter enclosed.

Respectfully yours,

pb
cc—
Mr. T. N. Bennett
Paragould, Arkansas

[fol. 587] FRISCO TRANSPORTATION COMPANY
Springfield, Mo.,
March 22, 1940.

T-7

MC-F-1037 Frisco Transportation Company—Purchase—
T. N. Bennett, d/b/a/ Bennett Truck Line.

Mr. W. P. Bartel, Secretary,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Mr. Bartel:

Referring to Order of the Commission in the above styled case.

The Frisco Transportation Company desires to consummate purchase of Mr. T. N. Bennett, in accordance with terms prescribed in Commission's Order, above referred to. The transaction will be completed and the line taken over on Monday, March 25th.

Immediate steps are being taken at this time to comply with insurance and tariff provisions and journal entries recording the transaction will be submitted at an early date.

Yours very truly,

RCB:C General Manager.

cc—Mr. W. Y. Blanning—Director.
Mr. Ray G. Atherton—District Director.
Mr. G. B. Perkins
Mr. W. W. Dalton.

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[fol. 588] INTERSTATE COMMERCE COMMISSION
Bureau of Motor Carriers
Washington

March 27, 1940

Please refer to file
Finance: No. MC-F-1037

Mr. W. L. English, General Manager,
Frisco Transportation Company,
Frisco Building,
Springfield, Missouri.

Dear Mr. English:

Receipt is acknowledged of your letter of March 22nd, your file T-7, advising us that the transaction authorized in the above-numbered case, entitled Frisco Transportation Company—Purchase—T. N. Bennett, would be consummated as of March 25, 1940.

Your statement regarding journal entries has been noted, and the attention of our Sections of Insurance and Traffic is being called to your statement with reference to insurance and tariff provisions.

Very truly yours,

W. Y. Blanning, Director.

Cy—Mr. James F. Miller,
Director, District No. 10,
Kansas City, Mo.

Mr. Ray G. Atherton,
Director, District No. 11,
Little Rock, Ark.

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[fol. 589] INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS
WASHINGTON

May 9, 1940
Refer to: G-407
Dockets Nos. MC 15911 and Subs 2 and 3
MC 89913 and Subs 8, 9, 10
MC 79434

Frisco Transportation Company
906 Olive Street
St. Louis, Missouri

Gentlemen:

Pursuant to the Commission's Report and Order in MC-F 1036 on March 18, 1940, you were authorized to acquire the operations of Ozark Truck Lines, Inc., Dockets Nos. MC 15911 and MC 15911 Sub 2 and MC 15911 Sub 3. This is to inform you that Docket No. MC 89913 Sub 8 has been assigned to cover the operations previously authorized under Docket No. MC 15911, and Docket No. MC 89913 Sub 9 has been assigned to cover the operations previously authorized under Dockets Nos. MC 15911 Sub 2 and MC 15911 Sub 3.

Under date of March 15, 1940 in MC-F 1037 you were authorized to acquire a portion of the operations authorized under Docket No. MC 79434, application of T. N. Bennett, d/b/a Bennett Truck Line. You are advised that Docket No. MC 89913 Sub 10 has been assigned to cover that portion of the operations transferred to you in this transaction.

In future correspondence with this Commission with respect to these operations, please refer to the docket numbers assigned.

Your cooperation will be appreciated.

Very truly yours,

W. Y. BLANNING, Director

cc: District Director James F. Miller

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[fol. 590] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington D. C. on the

13th day of June, A.D. 1940

MC 89913 Sub 10

APPLICATION OF FRISCO TRANSPORTATION COMPANY, ST. LOUIS, MISSOURI

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity to applicant's predecessor in interest upon compliance with the terms of said order; that the purchase of the operations herein involved having been approved and authorized, as provided in Section 213 of the Motor Carrier Act, 1935; and that further consideration having been had;

It further appearing, That applicant or predecessor in interest was on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specifications *set forth as appended on reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the Motor Carrier Act, 1935, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public,* a certificate of public convenience and necessity shall be issued, unless otherwise ordered, and authorizing said applicant to engage in interstate or foreign commerce as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, and unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order,* then said applicant shall show cause, if any there be, *within 60 days from the date of this order,* why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That the previous order entered in this proceeding describing the authority to which applicant's predecessor in interest has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, Division 5.

W. P. BARTEL,
Secretary.

(SEAL)

[fol. 591] EXHIBIT No. 16-A

Copies of
Certificates of Public Convenience and Necessity
issued by the
Interstate Commerce Commission
in favor of
Frisco Transportation Company, a corporation,
St. Louis, Missouri,
granting operating rights
as a common carrier of property by motor vehicle
on the following dates:

	Original Page	Printed Page
March 2, 1940 (MC-89913)	1	495-6
March 31, 1942 (MC-89913 and Sub 2)	2 & 3	496-8
March 31, 1942 (Sub 1 and Sub 3)	4 & 5	498-500
April 18, 1942 (Sub 5 and Sub 6)	6 & 7	501-3
June 13, 1940 (Sub 10)	8 & 9	503-5
July 16, 1943 (Consolidated)	10 - 15, Inc.	505-13
December 20, 1943 (Consolidated)	16 - 24, Inc.	514-27

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[fol. 592] COPY

CERTIFICATE

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 2nd day of March, A. D. 1940

No. MC 89913

APPLICATION OF FRISCO TRANSPORTATION COMPANY, A CORPORATION, ST. LOUIS, MISSOURI

Investigation of the matters and things involved in this proceeding having been made, and an order herein accompanied by a report having become effective as the order of the Commission, which report and order are hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require operation by the said applicant, and it is hereby authorized to engage in interstate or foreign commerce, on and after March 2, 1940, as a common carrier by motor vehicle of the commodities indicated, over the regular route, between fixed termini, and to and from intermediate points, as specified below:

Commodities generally, except those of unusual value, and except high explosives, household goods (when transported as a separate and distinct service in connection with so-called "household movings"), commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Paris, Tex., and Hugo, Okla.:

From Paris over Texas Highway 24 to the Texas-Oklahoma State line, thence over Oklahoma Highway 2 to Hugo, and return over the same route.

All intermediate points.

Service is not authorized from Hugo to Paris.

It is ordered, That this certificate shall remain in force for such period as the said carrier shall continue to perform the services herein authorized, unless revoked in accordance with the provisions of the Motor Carrier Act, 1935.

It is further ordered, That operations pursuant to this certificate shall be subject to such terms, conditions, and limitations as have been, or may be hereafter, prescribed by the Commission.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(Seal)

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[fol. 593] C-10.1

Certificate of Public Convenience and Necessity

No. MC 89913*

Frisco Transportation Company
a Corporation,
St. Louis, Missouri

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 31st day of March, A.D., 1942

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

General commodities, except those of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of* Household Goods, 17 M.C.C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, over a regular route.

Between Paris, Tex., and Hugo, Okla.:

From Paris over U.S. Highway 271 to Hugo, and return over the same route.

Service is authorized to and from all intermediate points.

It Is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

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[fol. 594] And It Is Further Ordered, That this certificate shall supersede the certificate issued in this proceeding on March 2, 1940, which is hereby canceled.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(Seal.)

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* This certificate also embraces Docket No. MC 89913 Sub 2, assigned to cover the operating rights purchased by the above-named carrier from J. A. Rose, Docket No. MC 66229, pursuant to MC-F-619, approved November 30, 1938.

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[fol. 595]

Certificate of Public Convenience and Necessity

No. MC 89913 Sub 1*

Frisco Transportation Company, a Corporation,
St. Louis, Missouri

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 31st day of March, A. D. 1942

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, Rules, and the regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may here-

after be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

General commodities, except those of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, over regular routes,

Between Kansas City, Kans., and Springfield, Mo., as follows:

From Kansas City over U. S. Highway 50 to Warrensburg, Mo., thence over Missouri Highway 13, via Fair Play, Mo., to Springfield;

From Kansas City as specified above to Fair Play, thence over Missouri Highway 123 to Springfield; and

Return over these routes to Kansas City.

Service is authorized to and from the intermediate points of Clinton, Kansas City, Bolivar, Humansville, Collins, Osceola, Deepwater, Fair Play, Walnut Grove, Aldrich, Eudora, Willard, Dunnegan, Vista, Lowry City, and Slagle, Mo.; and the off-route points of Phoenix, and Ash Grove, Mo.

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[fol. 596] Between St. Louis, Mo., and Joplin, Mo.:

From St. Louis over U. S. Highway 66 to junction U. S. Highway 60, thence over U. S. Highway 60 to junction Missouri Highway 14, thence over Missouri Highway 14 to Joplin, and return over the same route.

Service is authorized to and from the intermediate and off-route points of Waynesville, Rolla, Conway, Phillipsburg, St. James, Lebanon, and Springfield, Mo.

RESTRICTION: Applicant is not authorized to render service from or to, or interchange traffic at any point which is not a station on the rail lines of the St. Louis-San Francisco Railway Company, if such point is more than ten miles by highway from such station.

Between Joplin, Mo., and Miami, Okla., as follows:

From Joplin over U. S. Highway 66 to Baxter Springs, Kans., thence over U. S. Highway 166 to junction U. S. Highway 69, thence over U. S. Highway 69 to Miami;

From Joplin over U. S. Highway 66 to Miami; and

Return over these routes to Joplin.

Service is authorized to and from all intermediate points on the above-specified routes.

Between Joplin, Mo., and Carthage, Mo.:

From Joplin over U. S. Highway 66 to Carthage, and return over the same route.

Service is authorized to and from the intermediate points of Carterville, and Webb City, Mo.

AND IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

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* This certificate also embraces (1) the operating rights purchased by the above-named carrier from John Hamm, dba Southwest Freight Line, Dkt. No. MC 29652 pursuant to Finance Dkt. No. MC-F 618, approved November 30, 1938, (2) Dkt. No.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

No. MC 89913 Sub 5*

FRISCO TRANSPORTATION COMPANY,
A CORPORATION,
ST. LOUIS, MISSOURI.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 18th day of April, A. D., 1942

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

MC 89913 Sub 3, assigned to cover the operating rights purchased by said carrier from Joseph D. Cooper, dba Southwest Truck Line, Dkt. No. MC20440, pursuant to Finance Dkt. No. MC-F 578, approved Nov. 30, 1938, and (3) Dkt. No. MC 89913 Sub 9, assigned to cover the operating rights purchased by said carrier from Ozark Truck Lines, Inc., Dkt. Nos. MC 15911 Sub 2 and MC 15911 Sub 3, pursuant to Finance Dkt. No. MC-F 1036, approved March 18, 1940.

REGULAR ROUTES:

General commodities, except those of unusual value, and except dangerous explosives, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Jonesboro, Ark., and Memphis, Tenn.:

From Jonesboro over U. S. Highway 63 to Turrell, Ark., thence over U. S. Highway 61 to West Memphis, Ark., and thence over U. S. Highway 70 to Memphis, and return over the same route.

Service is authorized to and from all intermediate points.

General commodities, except those of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Walnut Ridge, Ark., and Jonesboro, Ark.:

From Walnut Ridge over U. S. Highway 67 to Hoxie, Ark., thence over U. S. Highway 63 to Jonesboro, and return over the same route.

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[fol. 598] Service is authorized to and from all intermediate points, restricted to the pick-up and delivery of soap and soap products southbound only.

Between Blytheville, Ark., and Turrell, Ark.:

From Blytheville over U. S. Highway 61 to Turrell, and return over the same route.

Service is authorized to and from all intermediate points; and the off-route points of Armorel, Dyess, Keiser, Marie, and Victoria, Ark.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That this certificate shall supersede the certificate issued to the above-named carrier under Docket No. MC 89913 Sub 7 on April 29, 1940, which is hereby canceled.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL.)

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* This certificate also embraces (1) the operating rights purchased by the above-named carrier from Joseph W. Parker, doing business as J. W. Parker Truck Line, Docket No. MC 71901 pursuant to MC-F 678, approved April 12, 1939, (2) Docket No. MC 89913 Sub 6, assigned to cover that portion of the operating rights purchased by the said carrier from Louis Tolson, doing business as Tolson Transfer Co., Docket No. MC 383, pursuant to Finance Docket No. MC-F 679, approved April 12, 1939, and (3) Docket No. MC 89913 Sub 7, assigned to cover the operating rights purchased by said carrier from Mrs. B. T. Blake, doing business as Blake Truck Line, Docket No. MC 29754, pursuant to Finance Docket No. MC-F 941, approved February 5, 1940.

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[fol. 599]

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

No. MC 89913 Sub 10*

FRISCO TRANSPORTATION COMPANY, A CORPORATION,
ST. LOUIS, MISSOURI

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 13th day of June, A. D. 1940

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Motor Carrier Act, 1935, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

General commodities, over a regular route,

Between Lake City, Ark., and Blytheville, Ark.:

From Lake City over Arkansas Highway 18 to Blytheville, and return over the same route.

Service is authorized to and from all intermediate points.

The operations herein authorized are subject to such further limitations, restrictions, or modifications as the Commission may hereafter find it necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the St. Louis-San Francisco Railway Company, and shall not unduly restrain competition.

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[fol. 600] It Is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure

so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

And It Is Further Ordered, That in addition to the terms, conditions, and limitations appearing elsewhere in this certificate the special terms, conditions, and limitations attached hereto as an appendix be, and they are hereby, made a part hereof.

By the Commission, Division 5.

W. P. Bartel,
Secretary.

(Seal.)

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* This certificate embraces that portion of the operating rights, authorized under Docket No. MC 79434, application of T. N. Bennett, d/b/a Bennett Truck Line, transferred to the above-named carrier pursuant to MC-F 1037, approved March 15, 1940.

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[fol. 601] C-15.1

Certificate of Public Convenience and Necessity

No. MC 89913*

Frisco Transportation Company, a Corporation,
St. Louis, Missouri

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 16th day of July, A. D., 1943

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and necessity as evidence of the authority of the holder to engage in

transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

REGULAR ROUTES:

General commodities, except those of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, commodities in bulk, commodities requiring, special equipment, and those injurious or contaminating to other lading,

Between Kansas City, Kans., and Springfield, Mo., as follows:

From Kansas City over U. S. Highway 50 to Warrensburg, Mo., thence over Missouri Highway 13, via Fair Play, Mo., to Springfield;

From Kansas City as specified above to Fair Play, thence over Missouri Highway 123 to Springfield; and

Return over these routes to Kansas City.

Service is authorized to and from the intermediate points of Clinton, Kansas City, Bolivar, Humansville, Collins, Osceola, Deepwater, Fair Play, Walnut Grove, Aldrich, Eudora, Willard, Dunnegan, Vista, Lowry City, and Slagle, Mo.; and the off-route points of Phoenix, and Ash Grove, Mo.

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[fol. 602] Between St. Louis, Mo., and Joplin, Mo.:

From St. Louis over U. S. Highway 66 to junction U. S. Highway 60, thence over U. S. Highway 60 to junction Missouri Highway 14, thence over Missouri Highway 14 to Joplin, and return over the same route.

Service is authorized to and from intermediate points on U. S. Highway 66, between St. Louis and Springfield, (including Springfield), and to and from the off-route points of Dixon, Crocker, Swedeborg, Richland, Stoutland, and Niangua, Mo.

RESTRICTION: Applicant is not authorized to render service from or to, or interchange traffic at any point which is not a station on the rail lines of the St. Louis-San Francisco Railway Company, if such point is more than ten miles by highway from such station.

Between Joplin, Mo., and Miami, Okla., as follows:

From Joplin over U. S. Highway 66 to Baxter Springs, Kans., thence over U. S. Highway 166 to junction U. S. Highway 69, thence over U. S. Highway 69 to Miami (also from Baxter Springs over U. S. Highway 66 to Miami).

Return over these routes to Joplin.

Service is authorized to and from all intermediate points on the above-specified routes.

Between Joplin, Mo., and Carthage, Mo.:

From Joplin over U. S. Highway 66 to Carthage, and return over the same route.

Service is authorized to and from the intermediate points of Carterville, and Webb City, Mo.

Between Paris, Tex., and Hugo, Okla.:

From Paris over U. S. Highway 271 to Hugo, and return over the same route.

Service is authorized to and from all intermediate points.

Between Jonesboro, Ark., and Memphis, Tenn.:

From Jonesboro over U. S. Highway 63 to Turrell, Ark., thence over U. S. Highway 61 to West Mem-

phis, Ark., and thence over U. S. Highway 70 to Memphis, and return over the same route.

Service is authorized to and from all intermediate points.

Between Walnut Ridge, Ark., and Jonesboro, Ark.:

From Walnut Ridge over U. S. Highway 67 to Hoxie, Ark., thence over U. S. Highway 63 to Jonesboro, and return over the same route.

Service is authorized to and from all intermediate points restricted to the pick-up and delivery of soap and soap products southbound only.

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[fol. 603] Between Blytheville, Ark., and Turrell, Ark.:

From Blytheville over U. S. Highway 61 to Turrell, and return over the same route.

Service is authorized to and from all intermediate points; and the off-route points of Armorel, Dyess, Keiser, Marie, and Victoria, Ark.

Between Wichita, Kans., and Fredonia, Kans.:

From Wichita over U. S. Highway 54 to junction Kansas Highway 96, thence over Kansas Highway 96 to junction Kansas Highway 47, and thence over Kansas Highway 47 to Fredonia, and return over the same route.

Service is authorized to and from all intermediate points except Augusta, Kans., and to and from the off-route points of Piedmont, Severy, Leon, Keighley, Haverhill, and Beaumont, Kans.

Between Fredonia, Kans., and Parsons, Kans.:

From Fredonia over Kansas Highway 96 to junction U. S. Highway 75, thence over U. S. Highway 75 to junction Kansas Highway 37, thence over

Kansas Highway 37 to junction U. S. Highway 169, thence over U. S. Highway 169 to junction U. S. Highway 160, thence over U. S. Highway 160 to Parsons, and return over the same route.

Service is authorized to and from the intermediate points of Brooks and Dennis, Kans.

Between Mt. Vernon, Mo., and Miller, Mo.:

From Mt. Vernon over Missouri Highway 39 to Miller, and return over the same route.

Service is not authorized to or from intermediate points.

Between Memphis, Tenn., and Columbus, Miss.:

From Memphis over U. S. Highway 78 to Tupelo, thence over U. S. Highway 45 to Columbus, and return over the same route.

Service is authorized to and from all intermediate points.

Between Nettleton, Miss., and Amory, Miss.:

From Nettleton over Mississippi Highway 6 to Amory, and return over the same route.

Service is authorized to and from all intermediate points.

Between Amory, Miss., and junction U. S. Highways 41 and 45:

From Amory over U. S. Highway 41 to junction U. S. Highway 45, and return over the same route.

Service is authorized to and from all intermediate points.

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[fol. 604] - *General commodities,* except dangerous explosives, and except household goods, as defined in *Practices of Motor Common Carriers of Household*

Goods, 17 M.C.C. 467, inflammable liquids, livestock, commodities in bulk, currency, bullion, commodities requiring special equipment, and those contaminating or injurious to other lading,

Between Newburg, Mo., and junction Phelps County Road T, and U. S. Highway 66:

From Newburg over Phelps County Road T to junction U. S. Highway 66, and return over the same route.

Between Newburg, Mo., and junction Phelps County Road P, and U. S. Highway 66:

From Newburg over Phelps County Road P to junction U. S. Highway 66, and return over the same route.

Between junction U. S. Highway 66 and Missouri Highway 17, and Fort Leonard A. Wood:

From junction U. S. Highway 66 and Missouri Highway 17 over Missouri Highway 17 to Fort Leonard A. Wood and depots adjacent to said fort, and return over the same route.

Service is not authorized to or from intermediate points on the above-specified routes.

General commodities, except livestock, and except dangerous explosives other than small arms ammunition, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, currency, bullion, commodities exceeding ordinary equipment and loading facilities, loose bulk commodities, and all other commodities expressly prohibited by law,

Between Carthage, Mo., and Springfield, Mo.:

From Carthage over U. S. Highway 66 to Springfield and return over the same route.

Service is not authorized to or from intermediate or off-route points.

General commodities, except those of unusual value, and except household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, and commodities in bulk,

Between Licking, Mo., and Salem, Mo.:

From Licking over Missouri Highway 32 to Salem, and return over the same route.

Service is authorized to and from all intermediate points.

General commodities, except those of unusual value, and except dangerous explosives, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Lake City, Ark., and Blytheville, Ark.

From Lake City over Arkansas Highway 18 to Blytheville, and return over the same route.

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[fol. 605] Service is authorized to and from all intermediate points.

These operations are subject to such limitations, restrictions, or modifications as the Commission may hereafter find it necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the St. Louis-San Francisco Railway Company, and shall not unduly restrain competition.

Between Muskogee, Okla., and Fayetteville, Ark.:

From Muskogee over U. S. Highway 62 to Fayetteville, and return over the same route.

Service is authorized to and from all intermediate points.

General commodities, except livestock, grain, petroleum products in bulk, dangerous explosives, commodi-

ties requiring special equipment, and household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467,

Between Tulsa, Okla., and Ada, Okla.:

From Tulsa over U. S. Highway 75 via Okmulgee to junction U. S. Highway 270, thence over U. S. Highway 270 to junction Oklahoma Highway 56, thence over Oklahoma Highway 56 to junction Oklahoma Highway 3, thence over Oklahoma Highway 3 to Ada.

Service is authorized to and from all intermediate points.

Between Sapulpa, Okla., and Oklahoma City, Okla.:

From Sapulpa over U. S. Highway 66 to Oklahoma City.

Service is authorized to and from all intermediate points, except Edmond, Okla.

Between Davis, Okla., and Durant, Okla.:

From Davis over Oklahoma Highway 7 to junction Oklahoma Highway 22, thence over Oklahoma Highway 22 to Tishomingo, thence return over Oklahoma Highway 22 to Ravia, Okla., thence over Oklahoma Highway 12 to junction U. S. Highway 70, thence over U. S. Highway 70 to Ardmore, thence return over U. S. Highway 70 to Russett, Okla., and thence over U. S. Highway 70 to Durant, and return over the same route.

Service is authorized to and from all intermediate points.

General commodities, except those of unusual value, and except dangerous explosives, livestock, household goods as defined in Practices of *Motor Common Carriers of Household Goods*, 17 M.C.C. 467, and commodities in bulk,

Between Tulsa, Okla., and Miami, Okla.:

From Tulsa over U. S. Highway 66 to Miami, and return over the same route.

Service is authorized to and from all intermediate points.

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[fol. 606] It Is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

And It Is Further Ordered, That this certificate shall supersede the certificates issued to the above-named carrier under Dockets Nos. MC 89913, MC 89913 Sub 1, MC 89913 Sub 5, MC 89913 Sub 8, MC 89913 Sub 10, and MC 89913 Sub 14, on March 31, 1942, March 31, 1942, April 18, 1942, April 27, 1942, June 13, 1940, and July 25, 1941, respectively in their entirety; those issued to the predecessors in interest under Dockets Nos. MC 73570, MC 73570 Sub 1, MC 74603, MC 61418, MC 52339 Sub 7, on December 11, 1940, July 1, 1942, November 15, 1940, May 7, 1942, and May 15, 1942, respectively, in their entirety; and those issued to the predecessors in interest under Dockets Nos. MC 66808 and MC 11135 on February 27, 1943, and March 20, 1942, respectively, with respect to the operating rights transferred to the above-named carrier, as set forth in the footnote appended hereto. Said certificates are hereby canceled to the extent they are superseded by this certificate.

By the Commission, division 5.

W. P. Bartel
Secretary.

(Seal.)

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* This certificate embraces (1) the authority previously granted the above-named carrier under Dockets Nos. MC 89913, MC 89913 Sub 1, MC 89913 Sub 5, MC 89913 Sub 8, MC 89913 Sub 10, and MC 89913 Sub 14, and the consolidations noted therein; (2) the

[fol. 607] C-15.1

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

No. MC 89913*

FRISCO TRANSPORTATION COMPANY, A CORPORATION
ST. LOUIS, MISSOURI

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D.C., on the 20th day of December, A. D., 1943

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, there-

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operations authorized said carrier under Docket No. MC 89913 Sub 24; (3) the operating rights purchased by said carrier from Theodora A. Bryan, doing business as Midwest Freight Lines, G. W. Moore, doing business as City Transfer, and Missouri Transportation Company, Dockets Nos. MC 73570, MC 73570 Sub 1, MC 74603, and MC 61418, respectively, pursuant to MC-F 1865, MC-F 1884, and MC-F 2021, approved September 30, 1942, September 30, 1942, and December 31, 1942, respectively; (4) the portions of operating rights purchased by said carrier from Powell Bros. Truck Lines, Inc., and William B. Mayers, doing business as Mayers National Truck Line, Dockets Nos. MC 66808 and MC 11135, respectively, pursuant to MC-F 1837 and MC-F 2022, approved September 30, 1942 and December 31, 1942, respectively, and (5) the operating rights purchased by said carrier from Keystone Freight Lines, Docket Nos. MC 52339 (portion) and MC 52339 Sub 7 (entire), Pursuant to MC-F 1977, approved March 2, 1943.

* This certificate embraces (1) the operating rights granted to the above-named carrier under Docket No. MC 89913, and the consolidations noted in the certificate previously issued in that proceeding; (2) the operating rights granted to said carrier under Docket No. MC 89913 Sub 15; (3) that portion of the operating rights of Powell Bros., Truck Lines, Inc., Docket No. MC 66808, purchased by the above-named carrier pursuant to MC-F 2097, approved July 10, 1943; and (4) that portion of the operating rights of Luper Transportation Company, of Oklahoma, Docket No. MC 52318, purchased by the above-named carrier, pursuant to MC-F 2163, approved August 24, 1943.

fore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

REGULAR ROUTES:

General commodities, except those of unusual value, and except household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, and commodities in bulk,

Between St. Louis, Mo., and Blytheville, Ark.:

From St. Louis over U. S. Highway 61 to Crystal City, Mo., thence over Missouri Highway 25 to junction U. S. Highway 61, thence over U. S. Highway 61 to Cape Girardeau, Mo., thence over Missouri Highway 74 to Dutchtown, Mo., thence over Missouri Highway 25 to junction Missouri Highway 55, thence over Missouri Highway 55 to junction U. S. Highway 61, and thence over U. S. Highway 61 to Blytheville, and return over the same route.

Service is authorized to and from the intermediate points of Imperial, Barnhardt, Festus, Crystal City, Ste. Genevieve, St. Mary's, Cape Girardeau, Chaffee, Oran, Sikeston, Matthews, Noxall, Kewanee, Marston, Conran, Portageville, Hayti, Steele, and Holland, Mo., and Yarbro, Ark., and the off-route points of Rush Tower, Brickeys, Mc-

Bride, Menfro, Seventy-Six, Wittenberg, Neelys Landing, Vanduser, McMullin, Lilbourn, and Swift, Mo.

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[fol. 608] Between Sikeston, Mo., and Leachville, Ark.:

From Sikeston over U. S. Highway 60 to junction Stoddard County, Mo., Trunk Highway A, thence over Stoddard-New Madrid Counties, Mo., Trunk Highway A to junction U. S. Highway 62, thence over New Madrid County, Mo., Trunk Highway B to junction New Madrid County, Mo., Trunk Highway T, thence over New Madrid County, Mo., Trunk Highway T to junction New Madrid County, Mo., Trunk Highway J, thence over New Madrid County, Mo., Trunk Highway J to junction New Madrid County, Mo., Trunk Highway C, thence over New Madrid County, Mo., Trunk Highway C to Clarkton, Mo., thence over Missouri Highway 25 to Arbyrd, Mo., thence over Missouri Highway 108 to the Missouri-Arkansas State line, and thence over Arkansas Highway 77 to Leachville, and return over the same route.

Service is authorized to and from the intermediate points of Morehouse, Parma, Risco, Tallipoosa, Gideon, Clarkton, Holcomb, Frisbee, White Oak, Kennett, Senath, Bucoda, Arbyrd, and Arkmo, Mo., and Boynton, Ark., and the off-route points of Canalou, Malden, Gibson, and Dillman, Mo.

Between junction Missouri Highway 25 and Missouri Highway 55, and junction in U. S. Highway 62 and U. S. Highway 67 in Arkansas:

From junction Missouri Highway 25 and Missouri Highway 55 over Missouri Highway 25 to Advance, Mo., thence over Stoddard-Bollinger Counties, Mo., Trunk Highway C to junction Bollinger County, Mo., Trunk Highway V, thence over Bollinger County, Mo., Trunk Highway V to junction

Stoddard County, Mo., Trunk Highway K, thence over Stoddard County, Mo., Trunk Highway K to Kinder, Mo., thence over Missouri Highway 51 to junction U. S. Highway 60, thence over U. S. Highway 60 to Poplar Bluff, Mo., and thence over U. S. Highway 67 to junction U. S. Highway 62 in Arkansas, and return over the same route.

Service is authorized to and from the intermediate points of Blomeyer, Delta, Arbor, Advance, Brownwood, Sturdivant, Kinder, Puxico, Mingo, and Poplar Bluff, Mo., and the off-route points of Rombauer, Harviell, and Naylor, Mo.

Between Holcomb, Mo., and Poplar Bluff, Mo.:

From Holcomb over Missouri Highway 53 to Poplar Bluff, and return over the same route.

Service is authorized to and from the intermediate points of Campbell and Qulin, Mo., and the off-route points of Fagus and Brosley, Mo.

Between Caruthersville, Mo., and Datto, Ark.:

From Caruthersville over Missouri Highway 84 to the Missouri-Arkansas State line, thence over Arkansas Highway 90 to junction unnumbered highway, thence over unnumbered highway via Nimmons and Carryville to junction U. S. Highway 62, thence over U. S. Highway 62 to Datto, and return over the same route.

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[fol. 609] Service is authorized to and from the intermediate points of Hayti and Kennett, Mo., Nimmons, Carryville, Piggott, and Pollard, Ark., and the off-route points of Pascola and Bragg City, Mo.

Restrictions: The service authorized is subject to the following conditions:

The service to be performed by said carrier shall be limited to service which is auxiliary to, or supplemental of, rail service of the St. Louis-San Francisco Railway Company, hereinafter called the railway.

Said carrier shall not serve any point not a station on a rail line of the railway.

No shipments shall be transported by said carrier as a common carrier by motor vehicle between any of the following points, or through or to or from more than one of said points: St. Louis, Chaffee, and Hayti, Mo. and Blytheville, Ark.; nor shall said carrier transport any shipment by motor vehicle between St. Louis and any point south or west of Chaffee.

All contractual arrangements between said carrier and the railway shall be reported to us and shall be subject to revision, if any as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

Such further specific conditions as we, in the future may find it necessary to impose in order to restrict said carrier's operation to service which is auxiliary to, or supplemental of, rail service.

General commodities, except those of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Kansas City, Kans., and Springfield, Mo., as follows:

From Kansas City over U. S. Highway 50 to Warrensburg, Mo., thence over Missouri Highway 13, via Fair Play, Mo., to Springfield;

From Kansas City as specified above to Fair Play, thence over Missouri Highway 123 to Springfield; and

Return over these routes to Kansas City.

Service is authorized to and from the intermediate points of Clinton, Kansas City, Bolivar, Humansville, Collins, Osceola, Deepwater, Fair Play, Walnut Grove, Aldrich, Eudora, Willard, Dunnegan, Vista, Lowry City, and Slagle, Mo.; and the off-route points of Phoenix, and Ash Grove, Mo.

Between St. Louis, Mo., and Joplin, Mo.:

From St. Louis over U. S. Highway 66 to junction U. S. Highway 60, thence over U. S. Highway 60 to junction Missouri Highway 14, thence over Missouri Highway 14 to Joplin, and return over the same route.

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[fol. 610] Service is authorized to and from intermediate points on U. S. Highway 66, between St. Louis and Springfield, (including Springfield); and to and from the off-route points of Dixon, Crocker, Swedeborg, Richland, Stoutland, and Niangua, Mo.

Restriction: Said carrier is not authorized to render service from or to, or interchange traffic at, any point which is not a station on the rail lines of the St. Louis-San Francisco Railway Company, if such point is more than 10 miles by highway from such station.

Between Joplin, Mo., and Miami, Okla.:

From Joplin over U. S. Highway 66 to Baxter Springs, Kans., thence over U. S. Highway 166 to junction U. S. Highway 69, thence over U. S. Highway 69 to Miami (also from Baxter Springs over U. S. Highway 66 to Miami), and return over these routes to Joplin.

Service is authorized to and from all intermediate points.

Between Joplin, Mo., and Carthage, Mo.:

From Joplin over U. S. Highway 66 to Carthage, and return over the same route.

Service is authorized to and from the intermediate points of Carterville, and Webb City, Mo.

Between Paris, Tex., and Hugo, Okla.:

From Paris over U. S. Highway 271 to Hugo, and return over the same route.

Service is authorized to and from all intermediate points.

Between Jonesboro, Ark., and Memphis, Tenn.:

From Jonesboro over U. S. Highway 63 to Memphis, and return over the same route.

Service is authorized to and from all intermediate points.

Between Walnut Ridge, Ark., and Jonesboro, Ark.:

From Walnut Ridge over U. S. Highway 67 to Hoxie, Ark., thence over U. S. Highway 63 to Jonesboro, and return over the same route.

Service is authorized to and from all intermediate points restricted to the pick-up and delivery of soap and soap products southbound only.

Between Blytheville, Ark., and Turrell, Ark.:

From Blytheville over U. S. Highway 61 to Turrell, and return over the same route.

Service is authorized to and from all intermediate points; and the off-route points of Armorel, Dyess, Keiser, Marie, and Victoria, Ark.

[fol. 611] Between Wichita, Kans., and Fredonia, Kans.:

From Wichita over Kansas Highway 96 to junction Kansas Highway 47, thence over Kansas Highway 47 to Fredonia, and return over the same route.

Service is authorized to and from all intermediate points except Augusta, Kans.; and to and from the off-route points of Piedmont, Severy, Leon, Keighley, Haverhill, and Beaumont, Kans.

Between Fredonia, Kans., and Parsons, Kans.:

From Fredonia over Kansas Highway 96 to junction U. S. Highway 75 thence over U. S. Highway 75 to junction Kansas Highway 37, thence over Kansas Highway 37 to junction U. S. Highway 169, thence over U. S. Highway 169 to junction U. S. Highway 160, thence over U. S. Highway 160 to Parsons, and return over the same route.

Service is authorized to and from the intermediate points of Brooks and Dennis, Kans.

Between Mt. Vernon, Mo., and Miller, Mo.:

From Mt. Vernon over Missouri Highway 39 to Miller, and return over the same route.

Service is not authorized to or from intermediate points.

Between Memphis, Tenn., and Columbus, Miss.:

From Memphis over U. S. Highway 78 to Tupelo, Miss., thence over U. S. Highway 45 to Columbus, and return over the same route.

Service is authorized to and from all intermediate points.

Between Nettleton, Miss., and Amory, Miss.:

From Nettleton over Mississippi Highway 6 to Amory, and return over the same route.

Service is authorized to and from all intermediate points.

Between Amory, Miss., and junction U. S. Highway 45 and Mississippi Highway 41:

From Amory over Mississippi Highway 41 to junction U. S. Highway 45, and return over the same route.

Service is authorized to and from all intermediate points.

Between Ada, Okla., and junction Oklahoma Highways 7 and 12, near Scullin, Okla.:

From Ada over Oklahoma Highway 12 to junction Oklahoma Highway 7, and return over the same route.

Service is authorized to and from all intermediate points.

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[fol. 612] *General commodities*, except dangerous explosives, and except household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, inflammable liquids, livestock, commodities in bulk, currency, bullion, commodities requiring special equipment, and those contaminating or injurious to other lading.

Between Newburg, Mo., and junction Phelps County Road T, and U. S. Highway 66:

From Newburg over Phelps County Road T to junction U. S. Highway 66, and return over the same route.

Between Newburg, Mo., and junction Phelps County Road P, and U. S. Highway 66:

From Newburg over Phelps County Road P to junction U. S. Highway 66, and return over the same route.

Between junction U. S. Highway 66 and Missouri Highway 17, and Fort Leonard A. Wood:

From junction U. S. Highway 66 and Missouri Highway 17 over Missouri Highway 17 to Fort Leonard A. Wood and depots adjacent to said fort, and return over the same route.

Service is not authorized to or from intermediate points on the above-specified routes.

General commodities, except livestock, and except dangerous explosives other than small arms ammunition, household goods as defined in *Practices of Motor Common Carriers of Household* Goods, 17 M.C.C. 467, currency, bullion, commodities exceeding ordinary equipment and loading facilities, loose bulk commodities, and all other commodities expressly prohibited by law,

Between Carthage, Mo., and Springfield, Mo.:

From Carthage over U. S. Highway 66 to Springfield, and return over the same route.

Service is not authorized to or from intermediate or off-route points.

General commodities, except those of unusual value, and except household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, and commodities in bulk,

Between Licking, Mo., and Salem, Mo.:

From Licking over Missouri Highway 32 to Salem, and return over the same route.

Service is authorized to and from all intermediate points.

General commodities, except those of unusual value, and except dangerous explosives, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

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[fol. 613] Between Lake City, Ark., and Blytheville, Ark.

From Lake City over Arkansas Highway 18 to Blytheville, and return over the same route.

Service is authorized to and from all intermediate points.

These operations are subject to such limitations, restrictions, or modifications as the Commission may hereafter find it necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the St. Louis-San Francisco Railway Company, and shall not unduly restrain competition.

Between Muskogee, Okla., and Fayetteville, Ark.:

From Muskogee over U. S. Highway 62 to Fayetteville, and return over the same route.

Service is authorized to and from all intermediate points.

General Commodities, except livestock, grain, petroleum products in bulk, dangerous explosives, commodities requiring special equipment, and household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467,

Between Tulsa, Okla., and Ada, Okla.:

From Tulsa over U. S. Highway 75 via Okmulgee to junction U. S. Highway 270, thence over U. S. Highway 270 to junction Oklahoma Highway 56, thence over Oklahoma Highway 56 to junction Oklahoma Highway 3, thence over Oklahoma

Highway 3 to Ada, and return over the same route.

Service is authorized to and from all intermediate points.

Between Sapulpa, Okla., and Oklahoma City, Okla.:

From Sapulpa over U. S. Highway 66 to Oklahoma City, and return over the same route.

Service is authorized to and from all intermediate points, except Edmond, Okla.

Between Davis, Okla., and Durant, Okla.:

From Davis over Oklahoma Highway 7 to junction Oklahoma Highway 22, thence over Oklahoma Highway 22 to Tishomingo, Okla., thence return over Oklahoma Highway 22 to Ravia, Okla., thence over Oklahoma Highway 12 to junction U. S. Highway 70, thence over U. S. Highway 70 to Ardmore, Okla., thence return over U. S. Highway 70 to Russett, Okla., and thence over U. S. Highway 70 to Durant, and return over the same route.

Service is authorized to and from all intermediate points.

General commodities, except those of unusual value, and except dangerous explosives, livestock, household goods as defined in *Practices of Motor Common Carriers of Household* Goods, 17 M.C.C. 467, and commodities in bulk,

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[fol. 614] Between Tulsa, Okla., and Miami, Okla.:

From Tulsa over U. S. Highway 66 to Miami, and return over the same route.

Service is authorized to and from all intermediate points.

General commodities,

Between junction Alternate U. S. Highway 71 and Missouri Highway 14 and Alma, Ark.:

From junction Alternate U. S. Highway 71 and Missouri Highway 14, near Fidelity, Mo., over Missouri Highway 14 to Sarcoxie, Mo., thence over Missouri Highway 37 to the Missouri-Arkansas State Line, thence over Arkansas Highway 47 to Gateway, Ark., thence over U. S. Highway 62 to Rogers, Ark., and thence over U. S. Highway 71 to Alma, and return over the same route.

Service is authorized to and from all intermediate points.

Between Springfield, Mo., and Seneca, Mo.:

From Springfield over U. S. Highway 66 to junction unnumbered highway approximately four miles west of Springfield, thence over unnumbered highway via Brookline Station to junction U. S. Highway 60, and thence over U. S. Highway 60 to Seneca, and return over the same route.

Service is authorized to and from all intermediate points.

General commodities, except automobiles, and except livestock, dangerous explosives, gasoline, and household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467,

Between Durant, Okla., and Dallas, Tex.:

From Durant over U. S. Highway 75 to Dallas, and return over the same route.

Service is authorized to and from all intermediate points which are stations on the rail lines of the St. Louis-San Francisco Railway Company, or are not more than 10 miles by Highway from a station on said rail lines.

It Is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do

shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

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[fol. 615] And It Is Further Ordered, That this certificate shall supersede the certificates issued to the above-named carrier under Docket Nos. MC 89913 and MC 89913 Sub 15, on July 16, 1943, and July 30, 1943, respectively, in their entirety, and those issued to the predecessors in interest under Docket Nos. MC 66808 and MC 52318 on May 1, 1943, and June 15, 1943, respectively, with respect to the operating rights transferred to the above-named carrier, as set forth in the footnote appended hereto, and said certificates are hereby canceled to the extent they are superseded by this certificate.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(Seal.)

[fol. 616] Interstate Commerce Commission

Served (Stamp)—May 17 1948

(Stamp)—O. K. Coyle

Notice to the Parties

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 20 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 10 days after the final date for filing exceptions.

No. MC-89913 (Sub-No. 1)[1]

FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

Submitted ..... Decided .....

On further hearing in No. MC-89913 (Sub-No. 1) and certain other proceedings, conditions imposed in the certificates issued therein to applicant to insure that the service rendered thereunder shall in the future be limited to that which is auxiliary to, or supplemental of, rail service. Issuance of amended certificates approved. Prior reports shown in appendix.

Appearances as shown in prior reports, and in addition:

A. J. Bauman and *E. J. Damon* for applicant.

W. M. Dyer for intervener in support of applicant.

Lee Reeder, Wentworth E. Griffin, B. W. LaTourette, Samuel Earnshaw, Harry E. Boot, Roland Rice, R. J. McBride, and *H. Lauren Lewis* for interveners in opposition to applicant.

REPORT AND ORDER ON FURTHER HEARING
RECOMMENDED BY WILLIAM T. CROFT AND
BEVERLEY S. SIMMS, EXAMINERS

In *Campbell Sixty-Six Exp., Inc.*, v. *Frisco Transp. Co.*, 43 M.C.C. 641, (hereinafter referred to as the *Campbell Sixty-Six case*), the Commission, division 5, had under consideration the question of whether Frisco Transportation Company, a wholly-owned subsidiary of St. Louis-San Francisco Railway Company, hereinafter called the Transportation Company and the Railroad, respectively, was conducting operations as a motor common carrier, in interstate or foreign commerce, in violation of section 206(a) and other sections of the Interstate Commerce Act and in wilful non-compliance with the lawful orders,

[1] This report also embraces the proceedings listed in the appendix hereto.

rules, and regulations of the Commission to which the operations were subject. It was found that certain cer- [fol. 617] tificates under which the Transportation Company was operating authorized the performance only of service which was strictly auxiliary or supplementary service to the rail service of the Railroad, and that the performance of a direct motor-carrier service to the public was unauthorized and should be discontinued. It issued no order, however, but stated that the proceedings involved would be reopened for reconsideration for the purpose of determining what, if any, conditions or restrictions should be imposed in the certificates in question so as to remove all doubt as to the character of the operations which the Transportation Company had been authorized to acquire and perform.[2] Subsequently, division 5 on its own motion reopened the proceedings embraced in this report for reconsideration; and pursuant thereto an examiner's proposed report on reconsideration based on records already made, was served. The Transportation Company filed exceptions to this proposed report (to which certain interveners replied) and included therein a request for further hearing in order to enable it to present certain new matters referred to in the exceptions but not then of record. By order entered May 28, 1945, upon consideration of the records, of the request for further hearing, and for good cause, the proceedings embraced herein were reopened for further hearing. Such further hearing was held April 8 and 9, 1946, at Kansas City, Mo., and the matter was subsequently referred to the examiners for further appropriate proceedings. The American Trucking Associations, Inc., and several motor carriers appeared at the further hearing in opposition to the Transportation Company, and the Chamber of Commerce of Wichita, Kans., appeared in its support.

The Transportation Company holds certificates authorizing motor common-carrier operations over an extensive

[2] In a subsequent report on oral argument, 46 M.C.C. 222, the Commission disapproved the division's finding that the Transportation Company had been engaged in operations unauthorized by the certificates as then phrased but it stated that the conditions, if any, which should be imposed in the certificates would be considered in the reopened proceedings.

system of regular routes in Missouri, Arkansas, Tennessee, Mississippi, Kansas, Oklahoma, and Texas. More specifically, its routes extend from St. Louis, Mo., on the northeast, Memphis, Tenn., and Columbus, Miss., on the southeast, and Kansas City, on the north, to Wichita, Kans., on the west, and Oklahoma City, Okla., and Dallas, Tex., on the southwest. They aggregate about 4800 miles, of which about 284 miles are involved in the subject proceedings. Although these routes parallel generally the lines of the Railroad, there are substantial segments which reach or traverse a considerable area not served by the latter, and in a number of instances connect divergent rail lines. All of the routes, except about three, were acquired through the purchase of the operating rights of various independent motor carriers. The character of the operations authorized over the system in general will be described briefly in order that the matters here in issue may be more fully understood. No restrictions limiting the operations to a rail auxiliary or supplementary service are imposed on the routes (1) between St. Louis and Carthage, Mo., via Springfield, (2) between Kansas City and Springfield, (3) between Lebanon and Collins, Mo., which connects the two preceding routes north of Springfield, (4) between Alma, Ark., Muskogee, Okla., and Springfield, (5) between Wichita and Parsons, Kans., (6) between Dallas, Oklahoma City, and Miami, Okla., (7) between Memphis and Columbus, (8) between Cape Girardeau and Poplar Bluff, Mo., and Blytheville, Ark., and (9) between Jonesboro, Ark., and Memphis. Operations over these routes, however, are in certain instances limited to service at points not more distant than 10 miles from rail sections of the Railroad. The routes be- [fol. 618] tween St. Louis and Hoxie, Ark., via Cabool, Mo., partly over the route described in (1) above, and between Springfield and Cabool are subject to two restrictions. One limits the service to points within 10 miles of rail stations, and the other designates St. Louis and Memphis as key points.[3] Extending from the last named

[3] The key-point restriction precludes the transportation of shipments between the points designated as key points, or through or to, or from more than one such point.

routes are routes into Van Buren and Mountain View, Mo., operation over which is also subject to key-point restrictions at St. Louis and Memphis. The routes between St. Louis and Blytheville and certain other points in Arkansas and Missouri are subject to all of the conditions usually imposed in operations of this character, including the designation of St. Louis, Chaffee and Hayti, Mo., and Blytheville as key points and a restriction against transporting shipments by truck between St. Louis and points south or west of Chaffee. The usual conditions, including a rail-haul condition,[4] are also applicable on the routes between Datto and Walnut Ridge, Ark., between Lake City and Nettleton, Ark., and between Marked Tree and West Ridge, Ark. The Transportation Company also operates over certain leased routes, among which is one connecting the Wichita-Parsons route and the Carthage-Springfield route, and one between Kansas City and Fort Smith, Ark.

The six certificates involved in this proceeding were issued pursuant to approved purchases of the operating rights of several independent motor carriers, and of them certificate No. MC-89913 (Sub-No. 10) alone contains a specific condition subjecting the operations to such future limitations as the Commission may find necessary to impose to make certain that the service performed shall be auxiliary to or supplemental of rail service. For this reason the Transportation Company at the outset of the hearing herein objected to the further hearing, contending that all interested parties have heretofore had a full opportunity to be heard, that none of them had requested the further hearing, and that its own request therefor was merely to substantiate the new matters presented in its exceptions. It accordingly moved for the discontinuance of the further proceeding, in support of which it offered certain evidence. It also submitted, under protest, and at the request of the examiner, evidence as to its operations and operations of the Railroad in general. Be-

[4] The rail-haul condition requires that the shipments transported by truck receive an immediately prior or immediately subsequent movement by rail.

fore further discussing the company's motion, the history of the certificates in question will be related.

Certificate No. MC-89913 (Sub-No. 1) was issued pursuant to an application by the Transportation Company in No. MC-F-618 for authority to purchase the operating rights of John Hamm, doing business as Southwest Freight Line, between Miami and Joplin, Mo., and intermediate points, a distance of 45 miles over U. S. Highways 66, 166, and 69. This route constitutes the connecting segment between the company's present routes extending easterly from Joplin and those extending southwesterly from Miami. In its application in MC-F-618 it represented to the Commission that the purpose of the application was

> * * * to enable (it) to establish a coordinated truck service with the train service of (the Railroad) along [fol. 619] this route. If the instant application is approved, it will enable (it) to make direct connection with the freight trains of the (Railroad), thereby making the rail and motor service mutually beneficial and enable them to better serve the shipping public.

In approving the purchase in *Frisco Transp. Co.—Purchase*—Hamm, 15 M.C.C. 320, the Commission, division 5, stated:

> The authority herein sought is desired to afford (the Transportation Company and the Railroad) means for developing coordinated rail-truck service with a view towards retrieving some of the substantial volume of less-than-carload freight diverted * * * to competing highway carriers, and to improve the (Railroad's) service to the public. This application and pending No. MC-F-578, which involves purchase of rights over a route between Joplin and Carthage, Mo., * * * is the first step in that direction. The proposed plan of operation will be similar to that instituted, pursuant to Commission authorization in other cases, by rail carriers in conjunction with truck subsidiaries, and contemplates the movement of merchandise cars to set out or concentration points along the line of the (Railroad) from which distribution will be made to

> the smaller intermediate points by truck. Thereby time in transit will be lessened, schedules of local trains presently handling the traffic will be expedited, and railroad economies inherent in coordinated service will be realized through elimination of numerous lightly-loaded merchandise cars.

The division found that the purchase for the purposes indicated would be consistent with the public interest, would promote the public interest by enabling the Railroad to use motor service to public advantage in its operations, and would not unduly restrain competition. Approval was granted subject to the following specific condition:

> * * * provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the (Railroad), and shall not unduly restrain competition * * *.

After consummation of the authorized transaction a certificate was issued to the Transportation Company. Apparently because the reserved right of the Commission later to impose restrictions for the purpose indicated amounted to something less than a restriction this certificate was issued without restrictions and, probably because it appeared unnecessary, without any reference to the Commission's reserved right later to restrict for the purpose indicated.

Certificate No. MC-89913 (Sub-No. 3) grows out of application No. MC-F-578 and covers operating authority purchased from Joseph D. Cooper, doing business as Southwest Truck Line, between Joplin and Carthage, over U. S. Highway 66, including the intermediate points of [fol. 620] Carterville and Webb City, Mo., 18 miles in distance. The application in No. MC-F-578 represented to the Commission that the proposed purchase was in the public interest because it would give the patrons along the route a more expeditious and speedy form of transportation to and from points along the lines of the Railroad and

because the truck service would "be coordinated with that of the rail to and from the towns of Carthage, Carterville, Webb City and Joplin." In approving the purchase, *Frisco Transp. Co.—Purchase—Cooper,* 15 M. C. C. 317, the Commission stated that a grant of the application would afford the Transportation Company and the Railroad the

> * * * means for developing coordinated rail-truck service with a view towards retrieving some of the substantial volume of less-than-carload freight diverted from the (Railroad) to competing highway carriers, and to improve the (Railroad's) service to the public. * * * If this purchase is approved, (the Transportation Company) proposes to operate two round-trip daily schedules between the points considered and to correlate such schedules with those of the fast through trains of the (Railroad). By such handling, it is estimated that time in transit can be lessened by from 1.5 to 24 hours * * *, and that economies inherent in coordinated service can be fully realized * * *.

As in the preceding report, the division found that the proposed purchase would be consistent with the public interest, promote the public interest by enabling the Railroad to use motor service to public advantage in its operations, and would not unduly restrain competition; and in its findings it again specifically conditioned its approval upon the reserved right later to impose any conditions which might be found necessary to "insure that the service shall be auxiliary or supplementary to the train service" of the Railroad, and shall not unduly restrain competition. The certificate, No. MC-89913 (Sub-No. 3) issued covering the rights so acquired, like that in the (Sub-No. 1) proceeding was also issued without any specific reference therein of the Commission's reserved right later to impose restrictions for the purpose indicated should a need therefor develop.

Certificate No. MC-89913 (Sub-No. 2) grew out of the purchase approved on application No. MC-F-619, *Frisco Trans. Co.—Purchase—Rose,* 15 M. C. C. 323, and covers an operation acquired from J. A. Rose from Hugo, Okla., to Paris, Tex., over U. S. Highway 271, a distance of 26

miles. In its application the Transportation Company again represented to the Commission that the purchase would promote the public interest because it would permit a coordinated rail-motor service. Specifically, it stated:

> * * * The trucking operation * * * parallels the (Railroad), and the truck service, when coordinated with the freight service rendered by the (Railroad), will greatly speed up and expedite the movement of less-carload freight to and from Hugo * * * and Paris, i.e., the movement of less-carload merchandise to Paris, * * * from St. Louis and Kansas City * * *, and points intermediate, will, by use of this coordinated service, arrive at Paris * * * 24 to 48 hours earlier than is now possible by all-rail movement, which service is distinctly in the interest of the shipping public.

[fol. 621] As in the preceding reports, the Commission found that the purchase would be consistent with the public interest, promote the public interest by enabling the Railroad to use service by motor vehicle to public advantage in its operations, and would not unduly restrain competition. And again the Commission's approval was made subject to a proviso reserving the right later to impose such limitations or restrictions as might be found necessary in order to make certain that the service performed under the acquired right "shall be auxiliary or supplementary to the train service" of the Railroad, and not unduly restrain competition. Like those already discussed the certificate issued in this proceeding, which was later amended to permit service in the reverse direction from Paris to Hugo, contained neither restrictions none of which had been imposed, nor reference to the reserved right later to impose restrictions should they be found necessary.

Certificate No. MC-89913 (Sub-No. 5) grew out of application No. MC-F-678 for authority for the purchase by the Transportation Company of the operating rights of Joseph W. Parker, doing business as J. W. Parker Truck Line, between Blytheville and Memphis and intermediate and certain off-route points, a route distance of about 75 miles. Certificate No. MC-89913 (Sub-No. 6) grew out of application No. MC-F-679 for authority for the purchase

of the operating rights of Louis Tolson, doing business as Tolson's Transfer, between Walnut Ridge and Memphis, about 92 miles. In each of these applications the Transportation Company again stated that the purpose of the purchases was to enable it to establish a truck service coordinated with the train service of the Railroad and to make direct connection with the freight trains of the Railroad, thereby making rail-motor service mutually beneficial. In support of its claim of consistency with the public interest the two applications, like the preceding ones, expressly relied upon the benefits which it was alleged would flow from a rail-motor coordinated service. The purchases were approved in a single report, *Frisco Transp. Co.—Purchase—Parker,* 25 M. C. C. 96, wherein the Commission found that the proposed transactions for the purposes indicated would be consistent with the public interest and promote the public interest by enabling the Railroad to use service by motor vehicle to public advantage in its operations. The transactions were approved but again were subject to the specifically reserved right later to impose conditions which might be found necessary to assure motor service that would be auxiliary or supplementary to the train service of the Railroad and which would not unduly restrain competition. With duplications eliminated, the operations included in the Sub-numbered 5 proceeding are now authorized between Blytheville and Turrell, Ark., serving all intermediate and certain off-route points; and those in the Sub-numbered 6 proceeding are authorized between Walnut Ridge and Memphis. The latter route is duplicated between Jonesboro and Memphis by authority acquired in *Frisco Transp. Co.—Purchase—Reddish,* 35 M. C. C. 132, from Mrs. B. T. Blake, doing business as Blake Truck Line. Again, the instant certificates were issued without specifically setting forth therein the reserved right of the Commission later to impose restrictions for the purpose indicated.

The final certificate involved herein is No. MC-89913 (Sub-No. 10). It represents authority acquired through the purchase of the operating rights of T. N. Bennett, doing business as Bennett Truck Lines, between Lake City, Ark., and Blytheville, approximately 45 miles, approved, [fol. 622] subject to the same reserved right later to im-

pose restriction designed to insure that the service should be limited to service auxiliary to or supplemental of train service, in MC-F-1037, *Frisco Transp. Co.—Purchase—* Bennett, 35 M. C. C. 802. This certificate although not restricted as to the service authorized differs from those already discussed in that it contains a specific reference to the reserved right of the Commission later to restrict for the purpose indicated.

In support of its motion to discontinue the further proceeding, the Transportation Company contends that there is nothing in the basic finance proceedings that would indicate the reason or purpose for the further hearing, and that the reopening order does not show that it was predicated upon the report in the *Campbell Sixty-Six case.* This contention requires little discussion, for as hereinbefore indicated each of the basic finance reports specifically reserved the right later to impose such conditions as might be found necessary to assure service auxiliary to or supplementary of train service; and in the case just mentioned the division specifically stated that it was reopening the proceedings for the purpose of determining what, if any, conditions should be imposed. Following that report, and pursuant thereto, the instant proceedings were reopened. The purpose of the further hearing, therefore, was obvious, and it is difficult to attribute to the Transportation Company the naivete in this respect that it professes. The company further contends that the certificates clearly set forth the operations authorized; and having been issued, the Commission is now without power to change, amend, modify, or revoke them other than in accordance with the provisions of section 212(a) of the act.[5] It argues that in

[5] Section 212(a) provides in substance that certificates shall remain in effect until suspended or terminated as provided in the section. They may "upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for wilful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, * * *." It further provides for a minimum of 30 days in which the holder may comply with a lawful order commanding obedience thereto.

each of the finance proceedings it made clear that it was purchasing whatever rights the vendors had and that it intended to continue the same type of operations the latter were conducting, plus the performance of a substituted service for the Railroad. It states that it has never deviated from its openly expressed view that the proper, economical, and unsubsidized operations of a motor carrier subsidiary should tender to the public both a substituted rail service and an independent motor service. It candidly admits that the fundamental reason it has, with few exceptions, acquired operating rights through purchase rather than through public convenience and necessity proceedings under section 207 of the act has been due to its belief or expectation that it could more easily obtain unrestricted all-motor authority by the former than by the latter method.

The question thus presented at the outset is whether the Commission has the power to reopen the instant proceedings for the purpose of imposing conditions in the certificates aimed at limiting the motor service authorized to service which is auxiliary to or supplemental of the [fol. 623] rail service of the Railroad. Admittedly in each of the finance proceedings above discussed the Transportation Company disclosed a desire, if permitted to do so, to continue all-motor services independently of the Railroad but in each proceeding it built its case primarily on the Railroad's need for an auxiliary motor service which would enable it to improve its less-than-carload freight service and upon the public benefits to be derived therefrom. And in each case the Commission following well established precedents *disapproved* the proposed independent all-motor operations and approved the subject acquisition only to enable the Transportation Company to perform service auxiliary to or supplemental of rail service as abundantly shown by the discussion in each report and by the repeated reservation of a right later to impose specific conditions or restrictions in order to limit the service as intended. In each instance, the finding that the purchase would be consistent with the public interest was clearly predicated upon the showing that the *Railroad* would be enabled thereby to use service by motor vehicle to public advantage in its *rail operations*. To insure

against any other type of service its approval in each instance was made subject to the unequivocal reservation of a right later to impose conditions should they be found necessary to prevent, in effect, a deviation by the Transportation Company from the auxiliary or supplementary service intended to be allowed. Accordingly, irrespective of what the Transportation Company may have hoped for with respect to the performance of an independent motor service, the basic finance reports of the Commission in each of the considered cases disclose with the utmost clarity that the Commission approved the purchases solely to permit an auxiliary or supplementary service, and subject to a right if necessary so to restrict the certificates. Only by reading into these reports language that is not there can it be concluded that an independent motor carrier operation was even seriously considered, much less approved.

Turning now to the certificates: The entire Commission, reversing division 5, has found that so long as they remain unrestricted, that is so long as the reserved right to restrict remains unexercised, all-motor operations by the Transportation Company not connected with rail service are not unlawful even though contrary to the intent of the division in authorizing the acquisitions. But it does not follow from this holding that the reserved right to restrict cannot or should not now be exercised. Neither is the exercise of such right precluded by the fact that it is not specifically referred to or restated in four of the five certificates here involved. These certificates, being based upon the findings in the finance proceedings, cannot authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority contemplated by the findings, such deficiency or deviation from the findings constitutes an inadvertent ministerial error in the preparation of the certificates. An error of this type may properly be corrected by the Commission in the manner here contemplated without proceeding in accordance with the provisions of section 212(a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of

any kind, is involved. The situation here is entirely different from that which existed in the cases cited by the company in support of its contention that the Commission may not now alter the certificates. *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465, involved, among others, the question whether the carrier's cessation of all opera- [fol. 624] tions under its certificate automatically and without further proceedings on the Commission's part caused a termination of the certificate by reason of the provision that it should remain in force for such period as the carrier should continue to perform the services authorized therein. It was contended in that case that this provision constituted a self-executing forfeiture of the certificate. The Commission, in finding that it did not and that the certificate could be revoked or terminated only under the provisions of section 212(a), stated:

> In expressing the views stated above, *we do not desire to be understood as holding that a certificate obtained by fraud, or misrepresentation, or one issued in error * * * may not be changed or revoked without proceeding under section 212(a). Here, there is no question of fraud, misrepresentation, or a certificate issued in error.* (Emphasis added.)

In *Hudson Bus Transp. Co., Inc., Common Carrier Application,* 46 M. C. C. 9, certain carriers petitioned for the revocation of Hudson's certificate on the ground that it inadvertently omitted a seasonal restriction and failed to specify certain streets over which the operation was to be conducted. The Commission, division 5, following the principle of the *Smith case, supra,* found that a certificate which has been issued and allowed to become final and effective without objection by interested parties, is conclusive against protestants in the absence of fraud, misrepresentation, *or inadvertence on the part of the Commission,* in other words that there has to be an end to litigation. It was found that neither fraud, misrepresentation, nor error existed; and that the fact that the certificate authorized "a somewhat different and larger operating authority than that originally requested by its predecessors does not constitute error, for our power to grant authority

in excess of that requested by them is clear." In effect, therefore, the division found that the certificate described the exact operations it had intended to authorize. The contrary is true here. The final case cited by the company, *Manhattan Coach Lines, Inc., et al.* v. *Adirondack Transit Lines, Inc.*, 42 M. C. C. 123, involved a situation similar to that in the preceding case and requires no discussion.

A comment is warranted with respect to the Supreme Court's recent decision in *United States* v. *Seatrain Lines*, 329 U. S. 424, rendered since the further hearings herein. It involved a certificate issued under Part III of the act authorizing the transportation of commodities generally between certain ports, subject to "such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission." A year and a half later the Commission on its own motion reopened the proceeding for the purpose of determining whether the certificate should be modified so as to *deprive* Seatrain of the right to carry commodities generally. The certificate was canceled and a new certificate issued which in effect eliminated commodities generally and made certain substitutions therefor which need not be set forth in detail. In holding that the Commission's action in altering the certificate was improper, the Court stated:

> We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct. For [fol. 625] all these indicate that prior to and at the time of the issuance of the Seatrain certificate it was the understanding of Seatrain and the Commission that its transportation * * * included carriage of freight cars and that carriage of freight cars would not exclude carriage of commodities generally. Moreover, the Seatrain application was not reopened for consideration by the Commission until its decision in *Foss Launch & Tug Co.*, 260 I. C. C. 103, * * *. There the Commission pointedly ruled for the first time that a certificate to carry "commodities generally" did not

> authorize water carriage of loaded or unloaded freight cars—so-called "car-ferry service." Thus it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the *Foss case*. This conclusion is supported by the fact that in prior proceedings * * * the Commission had rejected the contention that Seatrain's vessels could be classed as "car-ferries," and had concluded that they were ocean-going water carriers.

Acceptance of the Commission's power to reopen a certificate to correct a clerical error by the court is clearly implied in this language. As seen, however, it held only that the Commission's action there did not involve the mere correction of error, but represented an effort to invoke a newly conceived policy. Assuming without finding, that the reserved right to restrict amounted to an inchoate restriction or limitation which should have been carried into all the considered certificates as it was in the Sub-10 certificate,[6] the situation here is still materially different from that considered in the case just quoted. In preparing the instant certificates, an effect accomplished clerically by bodily lifting the findings from the basic reports and converting them to certificate form, a vital portion of the findings was inadvertently left out; and it is this error, clerical in nature, that the Commission is here proposing to correct. Unlike the *Seatrain case*, there is no attempt to revise what was intended to be done or to conform the certificates to a newly conceived policy. That this is true is clear, for before the instant finance proceedings were first decided the Commission's views with respect to limiting the motor operations of rail carriers

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[6] It well may be that the reserved right to restrict until exercised is in fact no restriction, has no place in the certificate and is equally effective whether carried into the certificate or not. This view finds some support in the conclusion of the entire Commission in the *Campbell Sixty-Six* case that even if carried into the certificate it still does not preclude, until actually exercised, an unlimited operation. Compare *Rock Island M. Transit—Purchase—White Line M. Freight*, 40 M.C.C. 457, 470.

and their affiliates to a service auxiliary or supplementary to rail service had for several years been firmly established, and were referred to in the basic finance reports. Indeed, the representations of applicants in the underlying applications, previously quoted, were in effect recognition of the restricted character of motor operations which it was the Commission's practice to authorize. The Commission's views on the subject were expressed as early as October 8, 1936, in *Pennsylvania Truck Lines, Inc.,—Control—Barker* M. Frt., 1 M. C. C. 101,[7] where the division stated:

> [fol. 626] * * * we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. * * * Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished * * * might flow from control of the railroad, but the question involved is broader than that and concerns the future of truck service generally. * * *

Another important feature distinguishing the *Seatrain case* is, as pointed out by the court, the fact that Part III of the act, unlike Part II, does not authorize the Commission to specify the service that water carriers may perform.

In the circumstances, the Commission has acted within the scope of its authority in reopening the instant proceedings for the purpose indicated; and, accordingly, the motion to discontinue the further proceeding is denied.

The certificates which do not now specifically recite the reservation of the right to impose conditions in the future are nevertheless subject to such right. They might properly be amended to include a recital of such right but there is also open in this proceeding the broader question

[7] See also *Kansas City S. Transp. Co., Inc., Common Carrier Application*, 10 M.C.C. 221, (decided November 12, 1938).

whether the Commission should exercise its reserved right and now add other conditions to the certificates and to the Sub-10 certificate to insure that future service of the Transportation Company shall be limited to service which is auxiliary or supplementary to the rail service of the Railroad. In referring to a similar reserved right in another case the Supreme Court in *Interstate Com. Com.* v. *Parker*, 326 U. S. 60, indicated that this could be done and in fact implied a duty on the Commission's part to do so. It stated:

> If the Commission later determines that the balance of public convenience and necessity shifts through competition or otherwise, so that the injury to the public from impairment of the inherent advantages of motor transportation exceeds the advantage to the public of efficient rail transportation, the Commission may correct the tendency by restoration of the rail movement requirement or otherwise.

The Commission has usually imposed five conditions for the accomplishment of the purpose indicated. They will now be discussed separately.

Condition 1

This condition, if imposed, would in general terms limit the character of service which the Transportation Company may perform to that which is "auxiliary to, or supplemental of," the rail service of the Railroad. The Transportation Company vigorously opposes it, contending that in reliance upon its unrestricted certificates and upon certain correspondence with the Commission's Bureau of Motor Carriers relative to the filing of tariffs which indicated that its status was to be that of an ordinary [fol. 627] motor carrier, it greatly expanded its operations in the years following its acquisitions; and that to restrict them now to a service solely auxiliary or supplementary to train service would destroy its investment, and in effect constitute the taking of its property without due process of law. It offered evidence of the extent of its expansion during the intervening years. Its assets have increased

from $109,540 to $1,083,871, and its capital stock investment from $100,000 to $450,000. Its employees have increased from 4 to 763, its trucks and tractors from 4 to 318, and its trailers from 4 to 458. Also, during those years, its all-motor tonnage has increased from 11,585 tons to 117,521 tons, and its joint rail-motor tonnage from 10,438 to 158,212 tons. The foregoing are however system figures which cover operations very much more extensive than those over the comparatively short route segments here involved. Based upon a traffic and revenue study over a 7-day period in February 1946, the Transportation Company estimates that it handles 8,868,080 pounds of traffic yearly in all-motor service over the particular route segments here involved, and that the loss thereof would represent a loss of $73,118.76 in revenue. This admittedly, however, presupposes a total loss of such traffic and does not take into account the possibility of the tonnage being diverted to the Railroad.

The extent to which the company has entered the independent motor-carrier field is cogently indicated by the fact that from 44 to 49 percent of its total business is now all-motor traffic handled in operations wholly independent of train service. It maintains a full line of motor carrier rates which are published by various truck bureaus and is party to a number of motor carrier tariffs. It interlines about 30 percent of its truck traffic with other motor carriers. It daily transports shipments in all-motor service over such distances as from St. Louis to Dallas and from Kansas City to Memphis. In the same trucks it may and does, at the same time, transport shipments moving on all-motor billing and at motor rates together with shipments moving between the same points on rail billings and at rail rates different from the motor rates. The Railroad in turn transports shipments by rail which are moving on the Transportation Company's all-motor billing and at all-motor rates. It exercises complete discretion when shipments are tendered without an indication of the mode of service desired as to whether it will transport them by rail or by motor. It compensates the Transportation Company for its substituted service at a flat rate per hundred pounds which is unaffected by the distance involved, and no study

has been made to determine whether or not such rate is compensatory. The Transportation Company pays the Railroad no dividends, but does make certain payments to it for "general expenses" and for materials and supplies obtained for it by the Railroad. About 100 of the Transportation Company's 250 stations are joint rail-motor stations, and the agents are joint employees of both companies.

The entire Commission recently had occasion in *Rock Island Motor Transit—Purchase—White Line M. Freight*, 40 M. C. C. 457, to review at length the subject of motor carrier operations by railroads. As shown by that report, the Commission found no occasion to depart from what has consistently been its position that, except in very special circumstances not here present, railroads cannot be permitted consistently with the public interest and the national transportation policy to engage in motor-carrier operations not auxiliary or supplementary to their rail service. The following statement by the Commission is significant:

> [fol. 628] It is our opinion, originally indicated in the *Kansas City Southern case* (*supra*) and confirmed by nearly a decade of experience in motor-carrier regulations, that the preservation of the inherent advantages of motor-carrier service and of healthy competition between railroads and motor carriers, and the promotion of economical and efficient transportation service by all modes of transportation and of sound conditions in the transportation and among the several carriers, in short the accomplishment of the purposes forming the national transportation policy require that, *except where unusual circumstances prevail, every grant to a railroad or to a railroad affiliate of authority to operate as a common carrier by motor vehicle or to acquire such authority by purchase or otherwise should be so conditioned as definitely to limit the future service by motor vehicle to that which is auxiliary to, or supplemental of, train service.* (emphasis supplied.)

As seen, the Transportation Company's case in each of the basic finance proceedings was built around ar emphasized

need for motor service with which rail service would be coordinated for the purpose of improving the rail service. The excerpts from the reports in those proceedings, quoted earlier herein, permit of no doubt that the purchases were approved, not for the purpose of permitting the company to engage in motor operations independent of its proprietary railroad, but solely to enable it to render a service auxiliary or supplementary to the rail service. This intent was neither obscurely nor uncertainly shown, for in each instance the tenor of the division's discussion and the specific reservation of the right in the findings in those reports to add restrictions for that purpose clearly disclosed what was being approved, and could not have mislead the Transportation Company or its proprietary railroad into consummating transactions or making investments which they would not otherwise have done. The reservation of the right to impose restrictions which might in the future be found necessary to preserve the auxiliary or supplementary character of the service was so definite and unequivocal that its inadvertent omission from the subsequently issued certificates was an error patent on the face of the certificates, and one which could not have mislead the Transportation Company. At the very least it was put on such notice as to the type of future operations which were contemplated that it cannot escape the responsibility for proceeding in a different manner without first taking appropriate steps to remove any doubts in its mind. The Transportation Company could not have been unaware of the discrepancy between the Commission's intent and its own practice. The Commission has found that until the right to restrict its certificate is exercised the Transportation Company lawfully can conduct all-motor operations independently of the Railroad but clearly it cannot by expansion and development of such all-motor operations in the face of the Commission's obvious contrary intent build up a bar against the Commission's exercise now of its reserved right to restrict. There is no deprivation of property in the Commission's exercise of a right subject to which the investments were made in the beginning. The Transportation Company was on notice from the beginning that its all-motor operations independent of the Railroad

were of the type which had been condemned by the Commission as contrary to the public interest and that they were such as would be specifically prohibited if under- [fol. 629] taken. Clearly, the circumstances negative any equitable or other basis for the perpetuation of its present practices. Indeed, it is the fact of the greatly expanded motor operations independent of Railroad that compels the exercise of the reserved right to impose conditions so as to return the operations to their proper and intended sphere—namely, a service auxiliary or supplementary to rail service.

To that end, condition 1 should be added to the certificates here involved.

Condition 2

This condition would limit the authorized service to points that are stations on the rail lines of the Railroad, and is calculated, together with condition 3, to implement and further the intent of condition 1. The only point on the routes embraced herein that is not a station on the rail lines is Dyess, Ark., a small community located 7 miles from the nearest station. Condition 2 should be imposed, but an exception made therein to permit the continuation of service at Dyess.

Condition 3

This condition, which as stated above supplements and implements condition 1, make take either of two forms. One form imposes a prior or subsequent rail-haul condition and the other designates so-called key points. In certain cases the Commission has prescribed a rail-haul condition, but has generally done so where for some reason the key-point restriction would have been ineffective. At first blush, the latter situation would appear to be presented with respect to the route from Hugo to Paris. This is a short route which is physically isolated from the other route, and to name one or the other terminus as a key point would be meaningless; and to name both termini would render the operating right practically useless. On the other hand, a rail-haul condition would prevent the handling of the little local traffic moving over the route.

In the circumstances, it is believed that neither form of condition 3 should be imposed particularly as the majority of the shipments will in all probability receive a prior or subsequent movement by rail. Accordingly, this condition, which will be imposed on the other routes involved herein, will have no applicability to the route from Hugo to Paris.

It is believed that an immediately prior or immediately subsequent rail-haul condition on the other routes embraced herein might be unduly restrictive, and accordingly a key-point restriction will be imposed. To be effective, however, the latter restriction will necessarily require the naming of a number of points as key points which are not located on the particular routes here in issue but which are on connecting routes. The naming of such points will not, of course, operate as a limitation or dimunition of the authorized operations over the latter routes, but solely as a limitation upon the service which may be performed over the routes embraced herein when used in connection with such other routes. Compare *Rock Island Motor Transit Co., Extension—Trenton, Mo.*, 43 M. C. C. 470, and *Pennsylvania Truck Lines, Inc., Extension—Lebanon, Ohio,* M. C. C. , (No. MC-19201 (Sub-No. 34) decided January 6, 1948).

[fol. 630] The Joplin-Miami and Joplin-Carthage routes are connecting routes which parallel generally branch lines of the Railroad extending from Miami through Quapaw, Okla., and Baxter Springs, Kans., to Joplin, and thence to Carthage, including a loop line from Quapaw through Picher, Okla., to Baxter Springs. These lines connect with the main lines of the Railroad at four points at which less-than-carload freight can be interchanged: at Miami they connect with lines extending southwesterly to Tulsa, Oklahoma City, Dallas, and Fort Worth, Tex.; at Baxter Springs with lines extending northerly to Kansas City; and at Carthage with lines extending westerly to Wichita, easterly to St. Louis and Memphis, and southerly to Fort Smith and Paris. The two routes combined traverse what is commonly known as the Tri-State area, consisting of the southwestern portion of Missouri, the southeastern portion of Kansas, and the northeastern portion of Oklahoma. Joplin, population 37,000, is the largest city and the main distributing center in the area. Carthage has a population

of 11,000, Miami 8,000, Webb City 7,000, Picher 6,000, Baxter Springs 5,000 and Galena, Kans., 4,000. As previously indicated, the Joplin-Miami route constitutes the connecting segment between the Transportation Company's routes east of Joplin into Springfield, Kansas City, St. Louis, and Memphis, and those west of Miami into Oklahoma City and Dallas. As such, it has enabled the Transportation Company to perform an all-motor service over the extremely long routes between St. Louis, Memphis, and Kansas City, on the one hand, and Dallas and Oklahoma City, on the other. Such operations are clearly contrary to the national transportation policy. The naming of key points to restore the service to one that is truly auxiliary or supplementary to rail service is imperative.

The Railroad's general practice is to transport its traffic as far as possible by rail before breaking bulk and substituting truck service. The points at which bulk is broken are determined primarily by the volume of traffic, and by such other factors as train schedules and connections. For several years St. Louis, Springfield, Tulsa, Oklahoma City, Dallas, Wichita, Kansas City, and Memphis have been consistent breakbulk points. At the time of the hearing it had certain other breakbulk points, for instance, (1) Afton and Madill, Okla., and Fort Smith and Joplin, are breakbulk points on merchandise cars moving from St. Louis, (2) Afton and Joplin on cars from Kansas City, (3) Ada, Okla., on cars from Tulsa, Okla., (4) Madill on cars from Springfield and Fort Worth, (5) Tulsa on cars from Enid, Okla., and Fort Smith, (6) and Springfield on cars from Fort Smith. A strictly merchandise train is operated from St. Louis and sets out cars at Springfield, Tulsa, Afton, Oklahoma City, and Dallas. It is claimed that the Railroad attempted to establish breakbulk points in the Tri-State area, for instance at Carthage, Baxter Springs Columbus, Kans., Joplin, and Miami; but that the flow of traffic has prevented any of these points from being used as such completely. Of them, Joplin and Afton are the only points now used for this purpose, but neither is said to be complete breakbulk points due to the fact that the traffic is generally westbound in the area, thus making it impossible to operate cars from Joplin or Afton. Accordingly, traffic from these points now moves by truck

to Springfield. The need is clearly demonstrated, however, for the key-point designation of Kansas City, Springfield, Joplin-Carthage (to be treated as a single point), Tulsa, Wichita, and Fort Smith; and this should be done.

The *Memphis-Blytheville route* generally parallels the rail line between Memphis and Blytheville. At Blytheville [fol. 631] the route connects with another motor route which parallels the rail line between Blytheville and St. Louis, approximately 235 miles. St. Louis, Chaffee, and Blytheville are key points on the latter route. At Memphis the route connects with three other motor routes extending to Walnut Ridge, Jonesboro (duplicating in part the route to Walnut Ridge), and Columbus. Operations over the Jonesboro and Columbus routes were authorized without restriction. The *Memphis-Walnut Ridge route* is limited to the transportation of general commodities between Memphis and Walnut Ridge only, and of soap and soap products at intermediate points between Walnut Ridge and Marked Tree when moving southbound only. As indicated, this route connects at Memphis with the motor routes extending to Jonesboro, Columbus, and Blytheville. At Walnut Ridge it connects with a route extending north to Datto (from which point other routes extend to Cape Girardeau and Caruthersville, Mo.), and at Hoxie with routes extending northwest via Willow Springs, Mo., to Springfield and via Rolla, Mo., to St. Louis. The Walnut Ridge-Datto route is subject to a rail-haul condition; those between Datto, Cape Girardeau, and Caruthersville are subject to the key points of St. Louis, Chaffee, Hayti, and Blytheville; and those between Hoxie, Springfield, and St. Louis are subject to key-point restrictions at St. Louis and Memphis. The *Blytheville-Lake City route*, paralleling a branch line of the Railroad, connects at Blytheville with the routes previously described between St. Louis and Memphis. At the intermediate point of Leachville, Ark., it connects with a motor route extending north to Sikeston, Mo., a point on the St. Louis-Blytheville route, on which St. Louis, Chaffee, Hayti, and Blytheville are designated as key points. At Lake City it connects with a motor route to Nettleton, an intermediate point on the Memphis-Jonesboro route, which is subject to a rail-haul condition.

As indicated earlier herein, Memphis, St. Louis, and Springfield have long been rail breakbulk points. In addition, at the time of the further hearing the Railroad had breakbulk points (1) at Amory, Miss., Blytheville, Chaffee, and Hayti on cars moving from St. Louis, (2) at Amory, Chaffee, and Hayti on cars from Memphis, (3) at Jonesboro on cars from Springfield, and (4) at Amory on cars moving from Birmingham. A need clearly exists, if there is to be any certainty that only a bona fide auxiliary or supplementary service to rail is to be rendered, that Memphis, Willow Springs, and Blytheville be designated as key points; that Jackson, Cape Girardeau, and Chaffee be designated collectively as a single key point; and that Amory, in order to prevent a by-passing thereof, and Tupelo, Miss., be designated collectively as a single key point.

Conditions 4 and 5

Condition 4 would provide that all contractual arrangements between the Transportation Company and the Railroad shall be reported to the Commission and shall be subject to revision as found necessary in order that the arrangements shall be fair and equitable to the parties. In matters relating to compensation between the two companies, the Railroad will in reality be dealing with itself and, so far as ultimate financial results to it are concerned, it is immaterial what these arrangements may be. It is important, however, that they be properly adjusted if the Commission and the general public are to know or have the means of ascertaining the cost to the Railroad of the services performed by the Transportation Company. Such information might be important in a rate proceeding or otherwise. See *Kansas City S. Transport Co., Inc., Com.* [fol. 632] *Car. Application, supra.* Accordingly, this condition should be imposed.

Condition 5 reserves to the Commission the right in the future to make such further changes or modifications in the conditions as may be necessary in order to make certain that the motor service remains auxiliary or supplementary to the rail service. It too should be imposed.

Upon further hearing, the examiners find that the certificates issued to the Transportation Company in the pro-

ceedings set forth in the appendix should be modified so as to require that all future operations conducted thereunder shall be subject to the following conditions and restrictions:

1. The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, hereinafter called the Railway.

2. Applicant shall not render any service to or from any point not a station on a rail line of the Railway, except that this condition shall not apply with respect to Dyess, Ark.

3. No shipments shall be transported by applicant between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin-Carthage (considered as one), St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Wichita, Kans., Tulsa, Okla., Fort Smith and Blytheville, Ark., Memphis, Tenn., and Amory-Typelo (considered as one), Miss.

4. All contractual arrangements between applicant and the Railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the Railway.

In view of the findings herein, the examiners recommend that the appended order be entered.

By William T. Croft and Beverley S. Simms, Examiners.

(Signature) W. T. Croft
(Signature) Beverley S. Simms

[fol. 633] APPENDIX

PROCEEDINGS COVERED BY REPORT

No. MC-89913 (Sub-No. 1)	Frisco Transportation Company Extension—Joplin-Miami.
No. MC-89913 (Sub-No. 2)	Frisco Transportation Company Extension—Hugo to Paris.
No. MC-89913 (Sub-No. 3)	Frisco Transportation Company Extension—Joplin-Carthage.
No. MC-89913 (Sub-No. 5)	Frisco Transportation Company Extension—Memphis-Blytheville.
No. MC-89913 (Sub-No. 6)	Frisco Transportation Company Extension—Memphis-Walnut Ridge.
No. MC-89913 (Sub-No. 10)	Frisco Transportation Company Extension—Blytheville-Lake City.
No. MC-F-578	Frisco Transportation Company—Purchase—Joseph D. Cooper. Prior Report: 15 M.C.C. 317.
No. MC-F-618	Frisco Transportation Company—Purchase—John Hamm. Prior Report: 15 M.C.C. 320.
No. MC-F-678	Frisco Transportation Company—Purchase—Joseph W. Parker. Prior Report: 25 M.C.C. 96.
No. MC-F-679	Frisco Transportation Company—Purchase—Louis Tolson. Prior Report: 25 M.C.C. 96.

[fol. 634] Recommended by William T. Croft and Beverley S. Simms, Examiners.

(Signature) Beverley S. Simms

(Signature) William T. Croft

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the day of A. D. 194 .

No. MC-89913 (Sub-No. 1)
FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-MIAMI

No. MC-89913 (Sub-No. 2)
FRISCO TRANSPORTATION COMPANY EXTENSION—HUGO TO PARIS

No. MC-89913 (Sub-No. 3)
FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-CARTHAGE

No. MC-89913 (Sub-No. 5)
FRISCO TRANSPORTATION COMPANY EXTENSION—MEMPHIS-BLYTHEVILLE

No. MC-89913 (Sub-No. 6)
FRISCO TRANSPORTATION COMPANY EXTENSION—MEMPHIS-WALNUT RIDGE

No. MC-89913 (Sub-No. 10)
FRISCO TRANSPORTATION COMPANY EXTENSION—BLYTHEVILLE-LAKE CITY

No. MC-F-578
FRISCO TRANSPORTATION COMPANY—PURCHASE—JOSEPH D. COOPER

No. MC-F-618
FRISCO TRANSPORTATION COMPANY—PURCHASE—JOHN HAMM

No. MC-F-619
FRISCO TRANSPORTATION COMPANY—PURCHASE—J. A. ROSE

No. MC-F-678
FRISCO TRANSPORTATION COMPANY—PURCHASE—JOSEPH W. PARKER

No. MC-F-679
FRISCO TRANSPORTATION COMPANY—PURCHASE—LOUIS TOLSON

It appearing, That, in the foregoing proceedings, the Commission, division 5, issued certificates of public convenience and necessity to the Frisco Transportation Company authorizing it to conduct certain motor-carrier operations in interstate or foreign commerce;

It further appearing, That, upon consideration of the records and of the petition of the Frisco Transportation Company, said proceedings were reopened for further hearing solely with respect to certain matters;

And it further appearing, That investigation of the matters and things involved in this proceeding having been made and said applications upon due notice having been [fol. 635] further heard and referred to the examiners who have made and filed a report on further hearing herein containing their findings of fact and conclusions thereon, which report and the prior reports in the above proceedings are hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That the certificates previously issued in said proceedings be, and they are hereby, modified to the extent shown in said report on further hearing; that in all other respects the provisions of the previous certificates shall remain in full force and effect; and that amended certificates be issued to the Frisco Transportation Company.

And it is further ordered, That this order shall be effective

By the Commission, division 5.

W. P. Bartel,
Secretary.

(Seal)

[fol. 636] ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of April, A. D. 1955.

No. MC-89913 (Sub. No. 1)

FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-MIAMI

No. MC-89913 (Sub. No. 2)

FRISCO TRANSPORTATION COMPANY EXTENSION—HUGO TO PARIS

No. MC-89913 (Sub. No. 3)

FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-CARTHAGE

No. MC-89913 (Sub. No. 5)

FRISCO TRANSPORTATION COMPANY EXTENSION—MEMPHIS-BLYTHEVILLE

No. MC-89913 (Sub. No. 6)

FRISCO TRANSPORTATION COMPANY EXTENSION—MEMPHIS-WALNUT RIDGE

No. MC-89913 (Sub. No. 10)

FRISCO TRANSPORTATION COMPANY EXTENSION—BLYTHEVILLE-LAKE CITY

No. MC-F-578

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOSEPH D. COOPER

No. MC-F-618

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOHN HAMM

No. MC-F-619

FRISCO TRANSPORTATION COMPANY—PURCHASE—J. A. ROSE

No. MC-F-678

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOSEPH W. PARKER

No. MC-F-679

FRISCO TRANSPORTATION COMPANY—PURCHASE—LOUIS TOLSON

Upon consideration of the records in the above-entitled proceedings, and of:

(1) Petition of applicant, dated February 2, 1954, for reconsideration of the Commission's report on oral argument of December 7, 1953;

(2) Joint reply of American Trucking Associations, Inc., and the Regular Common Carrier Conference, interveners in opposition, filed February 15, 1955;

(3) Joint reply of Be-Mac Transport Co., Inc., Consolidated Forwarding Co., Inc., Viking Freight Company, C. E. S. Truck Lines, Inc., L. A. Tucker Truck Lines, Inc., and Southern-Plaza Express Company, Inc., interveners in opposition, dated February 11, 1955;

[fol. 637] (4) Reply of Campbell Sixty-Six Express, Inc., intervener in opposition, dated February 11, 1955;

(5) Petition of Southern-Plaza Express Co., Inc., for leave to intervene and for leave to adopt the reply filed by Be-Mac Transport Co., Inc., referred to in (3) above;

and good cause appearing therefor:

It is ordered, That said petitioner, Southern-Plaza Express Co., Inc., be, and it is hereby, permitted to intervene in said proceedings with the right to appear and participate in all further proceedings herein;

It is further ordered, That Southern-Plaza Express Co., Inc., be, and it is hereby, permitted to adopt the reply of Be-Mac Transport Co., Inc., et al.;

It is further ordered, That said petition for reconsideration be, and it is hereby, denied, for the reason that the petition raises no issue of law or fact requiring a change in the findings in the report or oral argument, decided December 7, 1953.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 638] INTERSTATE COMMERCE COMMISSION

No. MC-89913 (Sub-No. 1)[1]

FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

Submitted October 25, 1948 *Decided October 22, 1951.*

On further hearing certain certificates heretofore issued to applicant revoked on finding that they were inadvertently issued. Conditions imposed in certificates issued in lieu of those revoked and in certificate in No. MC-89913 (Sub-No. 10) in order to insure that the service rendered thereunder shall in the future be limited to that which is auxiliary to, or supplemental of, rail service. Prior reports: 15 M.C.C. 320, 15 M.C.C. 317, 15 M.C.C. 323, 25 M.C.C. 96, 35 M.C.C. 132, and 35 M.C.C. 802.

Appearances as shown in prior reports, and in addition:

A. J. Bauman and *E. J. Damon* for applicant.

W. M. Dyer for intervener in support of applicant.

Lee Reeder, Wentworth E. Griffin, B. W. LaTourette, Samuel Earnshaw, Harry E. Boot, Roland Rice, R. J. McBride, and *H. Lauren Lewis* for interveners in opposition to applicant.

REPORT OF THE COMMISSION ON FURTHER HEARING

DIVISION 5, COMMISSIONERS LEE, ROGERS, AND PATTERSON

BY DIVISION 5:

Exceptions were filed by applicant to the order recommended by the examiners, and intervener Campbell Sixty-Six Express, Inc., replied. Our conclusions differ slightly from those recommended.

[1] This report also embraces the proceedings listed in the appendix hereto.

In *Campbell Sixty-Six Exp., Inc., v. Frisco Transp. Co.*, 43 M.C.C. 641, (hereinafter referred to as the *Campbell Sixty-Six case*), the Commission, division 5, had under consideration the question of whether the Frisco Transportation Company, a wholly-owned subsidiary of St. Louis-San Francisco Railway Company, hereinafter called the Transportation Company and the Railroad, respectively, was conducting operations as a motor-common carrier, in interstate or foreign commerce, in violation of section 206(a) and other sections of the Interstate Com- [fol. 639] merce Act and in willful non-compliance with the lawful orders, rules, and regulations of the Commission to which the operations were subject. It was found that certain certificates under which the Transportation Company was operating authorized the performance only of service which was strictly auxiliary or supplementary service to the rail service of the Railroad, and that the performance of a direct motor-carrier service to the public was unauthorized and should be discontinued. The division stated that the proceedings involved would be reopened for reconsideration for the purpose of determining what, if any, conditions or restrictions should be imposed in the certificates in question so as to remove all doubt as to the character of the operations which the Transportation Company had been authorized to acquire and in which it is authorized to engage.[2] Subsequently division 5 on its own motion reopened the proceedings covered by this report for reconsideration and an examiner's proposed report on reconsideration, based on records already made, was served. The Transportation Company filed exceptions to this proposed report (to which certain interveners replied) and included therein a request for a hearing to enable it to present certain new matters referred to in the exceptions but not then of record. By order entered May 28, 1945, upon consideration of the

[2] In a subsequent report on oral argument, 46 M.C.C. 222, the Commission disapproved the division's finding that the Transportation Company had been engaged in operations unauthorized by the certificates as then phrased but it stated that the conditions, if any, which should be imposed in the certificates would be considered in the reopened proceedings.

records, of the request for hearing, and for good cause, the proceedings embraced herein were reopened for further hearing. The American Trucking Associations, Inc., and several motor carriers appeared at the further hearing in opposition to the Transportation Company, and the [fol. 640] Chamber of Commerce of Wichita, Kans., appeared in its support.

The Transportation Company holds certificates authorizing motor common-carrier operations over an extensive system of regular routes in Missouri, Arkansas, Tennessee, Mississippi, Kansas, Oklahoma, and Texas. More specifically, its routes extend from St. Louis, Mo., on the northeast, Memphis, Tenn., and Columbus, Miss., on the southeast, and Kansas City, on the north, to Oklahoma City, Okla., and Dallas, Tex., on the southwest. They aggregate several thousand miles, of which about 284 miles are involved in the subject proceedings. Although these authorized routes parallel generally the lines of the Railroad, there are substantial segments which reach or traverse a considerable area not served by the Railroad, and in a number of instances connect divergent rail lines. All of the routes, except about three, were acquired through the purchase of the operating rights of various independent motor carriers. The character of the operations authorized over the system in general will be described briefly in order that the matters here in issue may be more fully understood. No restrictions limiting the operations to a rail auxiliary or supplementary service are imposed on the routes (1) between St. Louis and Carthage, Mo., via Springfield, (2) between Kansas City and Springfield, (3) between Lebanon and Collins, Mo., which connects the two preceding routes north of Springfield, (4) between Alma, Ark., and Springfield, (5) between Dallas, Oklahoma City, and Miami, (6) between Memphis and Columbus, and (7) between Jonesboro, Ark., and Memphis. Operations over these routes are, however, in certain instances limited to service at rail stations or at points not more distant than 10 miles from rail stations of the Railroad. The routes between St. Louis and Hoxie, Ark., via Cabool, Mo., partly over the route described in (1) above, and between Springfield and Cabool are subject to

two restrictions. One limits the service to points within [fol. 641] 10 miles of rail stations, and the other designates St. Louis and Memphis as key points.[3] Extending from the last named routes are routes into Van Buren and Mountain View, Mo., operation over which is also subject to key-point restrictions at St. Louis and Memphis. The routes between St. Louis and Blytheville and certain other points in Arkansas and Missouri are subject to all of the conditions usually imposed in operations of this character, including the designation of St. Louis, Chaffee and Hayti, Mo., and Blytheville as key points and a restriction against transporting shipments by truck between St. Louis and points south or west of Chaffee. The usual conditions, including a rail-haul condition,[4] are also applicable on the routes between Datto and Walnut Ridge, Ark., between Lake City and Nettleton, Ark., and between Marked Tree and West Ridge, Ark.

The six certificates involved in the instant proceedings were issued pursuant to approved purchases of the operating rights of several independent motor carriers, and of them certificate No. MC-89913 (Sub-No. 10) alone contains a specific condition subjecting the operations to such future limitations as the Commission may find necessary to impose in order to insure that the service performed shall be auxiliary to, or supplemental of, rail service. The Transportation Company at the outset of the further hearing herein objected to such hearing, contending that all interested parties had theretofore had a full opportunity to be heard, that none of them had requested the further hearing, and that its own request for a hearing was [fol. 642] merely to substantiate the new matters presented in its exceptions. It accordingly moved for the discontinuance of the further proceeding, in support of which motion it offered certain evidence. It also submitted,

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[3] The key-point restriction precludes the transportation of shipments between the points designated as key points, or through, or to, or from more than one such point.

[4] The rail-haul condition requires that the shipments transported by truck receive an immediately prior or immediately subsequent movement by rail.

at the request of the examiner, evidence as to its operations and operations of the railroad in general. Before further discussing the company's motion, which was renewed in its exceptions to the examiners' report and recommended order on further hearing, the history of the certificates in question will be related.

Certificate No. MC-89913 (Sub-No. 1) was issued pursuant to a purchase approved in No. MC-M-618, an application by the Transportation Company for authority to purchase the operating rights of John Hamm, doing business as Southwest Freight Line, between Miami and Joplin, Mo., and intermediate points, a distance of 45 miles over U. S. Highways 66, 166, and 69. This route constitutes a connecting segment between the company's present routes extending easterly from Joplin and those extending southwesterly from Miami. In its application in MC-F-618 the Transportation Company represented to the Commission that the purpose of the application was

> • • • to enable (it) to establish a coordinated truck service with the train service of (the Railroad) along this route. If the instant application is approved, it will enable (it) to make direct connection with the freight trains of the (Railroad), thereby making the rail and motor service mutually beneficial and enable them to better serve the shipping public.

In approving the purchase in *Frisco Transp. Co.—Purchase—Hamm*, 15 M.C.C. 320, the Commission, division 5, stated:

> The authority herein sought is desired to afford (the Transportation Company and the Railroad) means for developing coordinated rail-truck service with a view towards retrieving some of the substantial volume of less-than-carload freight diverted • • • to competing highway carriers, and to improve the (Railroad's) service to the public. This application and pending No. MC-F-578, which involves purchase of rights over a route between Joplin and Carthage, Mo., • • • is the first step in that direction. The proposed plan of operation will be similar to that instituted,

[fol. 643] pursuant to Commission authorization in other cases, by rail carriers in conjunction with truck subsidiaries, and contemplates the movement of merchandise cars to set out or concentration points along the line of the (Railroad) from which distribution will be made to the smaller intermediate points by truck. Thereby time in transit will be lessened, schedules of local trains presently handling the traffic will be expedited, and railroad economies inherent in coordinated service will be realized through elimination of numerous lightly-loaded merchandise cars.

The division found that the purchase for the purposes indicated would be consistent with the public interest, would promote the public interest by enabling the Railroad to use motor service to public advantage in its operations, and would not unduly restrain competition. Approval was granted subject to the following specific condition:

> * * * provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the (Railroad), and shall not unduly restrain competition * * *

After consummation of the authorized transaction a certificate was issued to the Transportation Company, in which, however, the above condition reserving the right later to impose restrictions for the purpose indicated was not incorporated.

Certificate No. MC-89913 (Sub-No. 3) was issued pursuant to a purchase approved in No. MC-F-578 and covers operating authority purchased from Joseph D. Cooper, doing business as Southwest Truck Line, between Joplin and Carthage, over U. S. Highway 66, including the intermediate points of Carterville and Webb City, Mo., a distance of 18 miles. The application in No. MC-F-578 represented to the Commission that the proposed purchase was in the public interest because it would give the patrons

along the route a more expeditious and speedier form of transportation to and from points along the lines of the Railroad and because the truck service would "be coordinated with that of the rail to and from the towns of Carthage, Carterville, Webb City and Joplin." In ap- [fol. 644] proving the purchase, *Frisco Transp. Co.—Purchase—Cooper*, 15 M.C.C. 317, the Commission, division 5, stated that a grant of the application would afford the Transportation Company and the Railroad the

> * * * means for developing coordinated rail-truck service with a view towards retrieving some of the substantial volume of less-than-carload freight diverted from the (Railroad) to competing highway carriers, and to improve the (Railroad's) service to the public. * * * If this purchase is approved, (the Transportation Company) proposes to operate two round-trip daily schedules between the points considered and to correlate such schedules with those of the fast through trains of the (Railroad). By such handling, it is estimated that time in transit can be lessened by from 1.5 to 24 hours * * *, and that economies inherent in coordinated service can be fully realized * * *.

As in the report in No. MC-F-618, previously discussed, the division found that the proposed purchase would be consistent with the public interest, would promote the public interest by enabling the Railroad to use motor service to public advantage in its operations, and would not unduly restrain competition; and, again, in its findings it specifically conditioned its approval upon the reserved right later to impose any conditions which might be found necessary to "insure that the service shall be auxiliary or supplementary to the train service" of the Railroad, and shall not unduly restrain competition. But, again, the certificate, No. MC-89913 (Sub-No. 3), issued covering the rights so acquired, like that in the (Sub-No. 1) proceeding was issued without incorporating any specific reservation of a right later to impose restrictions for the purpose indicated.

Certificate No. MC-89913 (Sub-No. 2) represents operating rights acquired by a purchase from J. A. Rose

approved in No. MC-F-619, *Frisco Transp. Co.—Purchase —Rose,* 15 M.C.C. 323, and covers an operation from Hugo, Okla., to Paris, Tex., over U. S. Highway 271, a distance of 26 miles. In its application in No. MC-F-619 the Transportation Company again represented to the [fol. 645] Commission that the proposed purchase from Rose would promote the public interest because it would permit a coordinated rail-motor service. Specifically, it stated:

> * * * The trucking operation * * * parallels the (Railroad), and the truck service, when coordinated with the freight service rendered by the (Railroad), will greatly speed up and expedite the movement of less-carload freight to and from Hugo * * * and Paris, i.e., the movement of less-carload merchandise to Paris, * * * from St. Louis and Kansas City * * *, and points intermediate, will, by use of this coordinated service, arrive at Paris * * * 24 to 48 hours earlier than is now possible by the all-rail movement, which service is distinctly in the interest of the shipping public.

As in the preceding reports, the Commission, division 5, found that the purchase would be consistent with the public interest, would promote the public interest by enabling the Railroad to use service by motor vehicle to public advantage in its operations, and would not unduly restrain competition. And again, the Commission's approval was made subject to a definite proviso reserving the right later to impose such limitations or restrictions as might be found necessary in order to insure that the service performed under the acquired right "shall be auxiliary or supplementary to the train service" of the Railroad, and shall not unduly restrain competition. Like those already discussed, the certificate issued covering the rights so acquired, which was later amended to permit service in the reverse direction from Paris to Hugo, contained no reference to the reserved right later to impose restrictions should they be found necessary.

Certificate No. MC-89913 (Sub-No. 5) grew out of application No. MC-F-678 filed by the Transportation Com-

pany for authority to purchase the operating rights of Joseph W. Parker, doing business as J. W. Parker Truck Line, between Blytheville and Memphis and intermediate and certain off-route points, a route-distance of about 75 miles. Certificate No. MC-89913 (Sub-No. 6) grew out of application No. MC-F-679 in which the Transportation [fol. 646] Company requested authority to purchase the operating rights of Louis Tolson, doing business as Tolson's Transfer, between Walnut Ridge and Memphis, about 92 miles. In each of these applications the Transportation Company again stated that the purpose of the proposed purchases was to enable it to establish a truck service coordinated with the train service of the Railroad and to make direct connection with the freight trains of the Railroad, thereby making rail-motor service mutually beneficial. In support of its claim of consistency with the public interest the two applications, like the preceding ones, expressly relied upon the benefits which it was alleged would flow from a rail-motor coordinated service. The purchases were approved in a single report, *Frisco Transp. Co.—Purchase—Parker,* 25 M.C.C. 96, wherein the Commission, division 5, found that the proposed transactions for the purposes indicated would be consistent with the public interest and would promote the public interest by enabling the Railroad to use service by motor vehicle to public advantage in its operations. The transactions were approved subject to the specifically reserved right later to impose conditions which might be found necessary to assure motor service that would be auxiliary or supplementary to the train service of the Railroad and which would not unduly restrain competition. With duplications eliminated, the operations involved in the No. MC-F-678 proceeding are now authorized between Blytheville and Turrell, Ark., serving all intermediate and certain off-route points in No. MC-89913 (Sub-No. 5); and those in the No. MC-F-679 proceeding are authorized between Walnut Ridge and Memphis in No. MC-89913 (Sub-No. 6). The latter route is duplicated between Jonesboro and Memphis by authority acquired in *Frisco Transp. Co.—Purchase—Reddish,* 35 M.C.C 132, from Mrs. B. T. Blake, doing business as Blake

Truck Line. Again, the certificates indicated were issued [fol. 647] without specifically setting forth therein the reserved right of the Commission later to impose restrictions for the purpose indicated.

The final certificate involved herein is that issued in No. MC-89913 (Sub-No. 10). It represents authority acquired by the Transportation Company through the purchase of the operating rights of T. N. Bennett, doing business as Bennett Truck Lines, between Lake City, Ark., and Blytheville, approximately 45 miles, which purchase was approved subject to the same reserved right later to impose restrictions designed to insure that the future motor service should be limited to service auxiliary to or supplemental of train service. See MC-F-1037, *Frisco Transp. Co.—Purchase—Bennett,* 35 M.C.C. 802. This certificate, although it carries no restriction as to the character of the motor service authorized, differs from those already discussed in that it does contain a specific reservation of a right in the Commission later to restrict for the purpose indicated.

The examiners recommended that each of the certificates above discussed be modified so as to require that all future operations under them be subject to the following conditions:

1. The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, hereinafter called the Railway.

2. Applicant shall not render any service to or from any point not a station on a rail line of the Railway, except that this condition shall not apply with respect to Dyess, Ark.

3. No shipments shall be transported by applicant between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin-Carthage (considered as one), St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Wichita, Kans., Tulsa, Okla., Fort Smith and Blytheville, Ark., Mem-

phis, Tenn., and Amory-Typelo (considered as one), Miss.

[fol. 648] 4. All contractual arrangements between applicant and the Railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the Railway.

On exceptions, the Transportation Company renews its motion to discontinue the proceedings on the ground that it made no request for the further hearing; that the notice thereof did not inform it of the purpose of the further hearing; that it has not had a full hearing; that no evidence has been adduced to show the need for the imposition of the recommended conditions; and that it has been denied due process of law. Whether or not the carrier requested the further hearing is of little consequence, for our power to reopen is not dependent upon a request therefor by it. The other contentions require little discussion. As hereinbefore indicated, each of the basic finance reports specifically reserve the right later to impose such conditions as might be found necessary to assure service auxiliary to or supplementary of train service; and in the *Campbell Sixty-Six case* the division specifically stated that it was reopening these proceedings for the purpose of determining what, if any, conditions should be imposed. Following that report, and pursuant thereto, the instant proceedings were reopened. The purpose of the further hearing was obvious, and in the circumstances we are not impressed by the argument that the Transportation Company was unable to foresee the issues or that it has not been accorded due process of law. Substantially similar arguments were recently considered and found to be without merit by the Supreme Court in *United States* v. *Texas & Pacific Motor Transport Co.*, U. S. , 71 S. Ct. 422.

The Transportation Company further contends that the [fol. 649] certificates clearly set forth the operations authorized, and having been issued, we are now without power to change, amend, modify, or revoke them other than in accordance with the provisions of section 212(a) of the act[5]; that the recommended conditions would disunite the segments of the involved routes from all its other operations and preclude the heretofore approved unification of operations not before us in these proceedings; that such conditions reflect a change in policy in respect of auxiliary and supplementary service from that in effect at the time the certificates were issued; that they contravene the national transportation policy which is to develop and preserve a national transportation system; and that no statutory authority exists for the reservation of a right later to change the terms of issued certificates.

Admittedly, in each of the finance proceedings above discussed the Transportation Company disclosed a desire, if permitted to do so, to continue all-motor services independently of the Railroad, but in each proceeding it built its case primarily on the Railroad's need for an auxiliary motor service which would enable it to improve its less-than-carload rail freight service and upon the public benefits to be derived from a coordinated motor-rail service. And in each case the Commission, division 5, following then well established precedents disapproved the proposed independent all-motor operations and approved the proposed acquisition only to enable the Transportation Company to perform service auxiliary to or supplemental of the rail service of the Railroad, as is abundantly shown

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[5] Section 212(a) provides in substance that certificates shall remain in effect until suspended or terminated as provided in the section. They may "upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, * * *". It further provides for a minimum of 30 days in which the holder may comply with a lawful order commanding obedience thereto.

[fol. 650] by the discussion in each report. In each instance, the finding that the purchase would be consistent with the public interest was clearly predicated upon the showing that the *Railroad* would be enabled thereby to use service by motor vehicle to public advantage in its *rail operations*. It is clear that the purchases were approved for no other purpose and the reports in each case clearly imply an intent and expectation that all motor operations not in aid of the rail service would not be undertaken. Relying upon its declaration of its intent and expectation the division did not deem it necessary to impose specific conditions limiting the character of the future operations but to insure against the rendition by the Transportation Company of any other type of service than that intended the approval of the purchase was made subject, in each instance, to the unequivocal reservation of a right later to impose conditions should they be found necessary to prevent, in effect, a deviation by the Transportation Company from the auxiliary or supplementary service intended to be allowed despite what the Transportation Company might have hoped for respecting the performance of an all-out motor carrier service. Only by reading into these reports language that is not there can it be concluded that such an operation was even seriously considered, much less approved. Further discussion of the Transportation Company's arguments on this score, however, is unnecessary, for substantially similar arguments were recently considered at length by the Supreme Court and found to be without merit. *United States* v. *Texas & Pacific Motor Transport Co., supra; United States* v. *Rock Island Motor Transit Co.*, 71 S. Ct. 382. In the light of those decisions, there can no longer be any doubt as to our power to exercise the reserved right to impose [fol. 651] conditions necessary in our judgment to assure operations auxiliary to, or supplemental of, train service.

The only real substantive question remaining on this point is whether the omission from the certificates issued in Nos. MC-89913 (Sub-Nos. 1, 2, 3, 5 and 6) of the condition imposed in our findings in the finance reports, reserving the right to impose such further limitations or restrictions as we may find necessary to impose in

order to insure that the service shall be auxiliary or supplementary to train service, prevents us from exercising that right without contravening the provisions of Section 212(a) of the Act. The examiners found that the condition was inadvertently omitted; that the certificates might properly be amended to include a recital of that right; and that certain conditions and restrictions should be imposed. The Transportation Company on exceptions argues that a comparison of the wording in the findings and that used in the certificates, also the long interval between the dates of the findings and the dates of the certificates and the considerable amount of interim handling and correspondence regarding compliance with the tariff provisions of the act, all indicate that more than clerical effort and skill were involved in the certificates' preparation. It asserts that the omission was not inadvertent but was the result of administrative and executive determination; that clerical drafts of certificates are reviewed by employees in the Commission having administrative or executive authority; and that their issuance is the subject of formal orders carrying the imprimature of the secretary. It contends that it has been given no opportunity to cross examine witnesses, presumably Commission personnel, with respect to the preparation of certificates, and has been deprived of due process of law.

[fol. 652] We may, of course, take official notice of our administrative procedures and practices. The preparation of certificates is a duty assigned to our Section of Certificates. Upon adoption, reports and orders approving the issuance of certificates automatically and routinely go to this Section. After the lapse of the prescribed time for filing petitions, the clerical employees of this section having no discretionary authority insert on a form containing mimeographed stock paragraphs the authority described in the findings of the report, namely, the commodities (if the transportation of property is involved), the origin and destination, routes, and restrictions or conditions, if any. They are concerned only with the findings and not with the text of the report, and their sole function is to transpose the substance of the findings onto the certificate form, making such changes in language as may be required to

conform to the wording customarily used in certificates. They have no authority to add to, or detract from, the findings or to make any change therein even though the text of the report should show a discrepancy. In the latter event, corrective action may be taken only by the Commission or a division thereof through a formal supplemental report, report on reconsideration, or a modifying order. In performing this clerical duty, the employees in question exercise no judgment, discretion, or interpretative power as to the character of authority being certificated other than to call to our attention any patent discrepancies they discover. Their drafting of the certificate is not reviewed except by a supervisor also without discretionary authority solely to insure a correct reflection of the findings.

The certificates here in issue, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the [fol. 653] division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority contemplated by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. Under these circumstances the certificates may be revoked, and certificates in accord with such findings issued, without proceeding in accordance with the provisions of section 212(a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved.

The situation here is entirely different from that involved in the cases cited by the Transportation Company in support of its contention that we may not now alter the certificates. *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, 42 M.C.C. 211, involved, among others, the question whether the carrier's cessation of all operations under its certificate automatically and without further proceedings on the Commission's part caused a termination of the certificate by reason of a provision therein that it should remain in force for such period as the carrier should continue to perform the services authorized. It was contended in that case that this provision constituted a self-executing forfeiture of the certificate in the event of a

cessation of operations. The Commission, in finding that it did not and that the certificate could be revoked or terminated only under the provisions of section 212(a), stated:

> In expressing the views stated above *we do not desire to be understood as holding that a certificate obtained by fraud or misrepresentation, or inadvertently issued by the Commission, may not be changed or revoked without proceeding under section 212(a). Here, there is no question of fraud, misrepresentation, or inadvertence.* (emphasis added).

[fol. 654] In *Hudson Bus Transp. Co., Inc., Common Carrier Application,* 46 M.C.C. 9, certain carriers petitioned for the revocation of Hudson's certificate on the ground that it inadvertently omitted a seasonal restriction and failed to specify certain streets over which the operation was to be conducted. The Commission, division 5, following the principle of the *Smith case, supra,* held that a certificate which has been issued and allowed to become final and effective without objection by interested parties, is conclusive against protestants in the absence of fraud, misrepresentation, or inadvertence on the part of the Commission, in other words that there has to be an end to litigation. The division found that the fact "that Hudson was found entitled to a somewhat different and larger operating authority than that originally requested by its predecessors does not constitute error, for our power to grant authority in excess of that requested by them is clear." In effect, therefore, the division found, which is not the case here, that the certificate described the exact operations it had intended to authorize. There was no fraud or misrepresentation, and no inadvertence in the issuance of the certificate to Hudson. The case of *Manhattan Coach Lines, Inc., et al* v. *Adirondack Transit Lines, Inc.,* 42 M.C.C. 123, involved a situation similar to that in the preceding case and requires no discussion. Pertinent in this connection is the following comment in respect of the correction of errors from the Supreme Court's decision in *United States* v. *Seatrain Lines,* 329 U.S. 424:

> We need not determine the Commission's statutory power to correct clerical mistakes, since we are per-

suaded that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct. * * * Thus it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the *Foss case*. * * *

Acceptance by the Court of the Commission's power to revise a certificate which was inadvertently issued is clearly implied in this language. As seen, however, it held only that the Commission's action there did not involve the mere correction of a clerical error, but represented an effort to invoke a newly conceived policy.

[fol. 655] The reserved right to restrict amounted to an inchoate restriction or limitation which should have been carried into all the considered certificates as it was in the Sub-10 certificate.* The failure so to do was inadvertent and the resulting situation here is materially different from that considered in the case just quoted.

We might properly revoke or amend the certificates, except that issued in the Sub-No. 10 proceeding, and issue new or amended certificates containing a specific recital of the reserved right to impose further limitations or restrictions to insure that future service of the Transportation Company over the routes here involved shall be limited to service which is auxiliary or supplementary to the rail service of the Railroad, and then, after issuance of such new or amended certificates, consider the further question whether the reserved right should be exercised and, if we should find that it should be exercised, thereafter issue amended certificates containing such further limitations or restrictions. Such a course, would, however, be unnecessarily cumbersome considering the fact that a full and

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*It well may be that the reserved right to restrict until exercised is in fact no restriction, has no place in the certificate and is equally effective whether carried into the certificate or not. This view finds some support in the conclusion of the entire Commission in the *Campbell Sixty-Six* case that even if carried into the certificate it still does not preclude, until actually exercised, an unlimited operation. Compare *Rock Island M. Transit—Purchase—White Line M. Freight*, 40 M.C.C. 457, 470.

fair hearing already has been held for the purpose of determining what, if any, further limitations or restrictions should be imposed. In view of this we shall proceed, now, to the broader question as to whether we should exercise the reserved right and impose further limitations or restrictions. We have usually imposed five conditions in certificates authorizing auxiliary or supplementary service, and these will now be discussed separately in the light of the evidence of record.

[fol. 656] *Condition 1*

This condition, if imposed, would, in general terms limit the character of service which the Transportation Company may perform to that which is "auxiliary to, or supplemental of," the rail service of the Railroad. These terms which the Transportation Company asserts are vague and indefinite, have been defined in *Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M.C.C. 721, and approved directly or indirectly in several court decisions. Further explanation here is unnecessary. The Transportation Company vigorously opposes this condition, contending that in reliance upon its unrestricted certificates and upon certain correspondence with the Commission's Bureau of Motor Carriers relative to the filing of tariffs which indicated that its status was to be that of an ordinary motor carrier, it greatly expanded its operations in the years following its acquisitions; and that to restrict them now to a service solely auxiliary or supplementary to train service would destroy its investment, and in effect constitute the taking of its property without due process of law. It offered evidence of the extent of its expanded operations. Its assets have increased from $109,540 to $1,083,871, and its capital stock investment from $100,000 to $450,000. Its employees have increased from 4 to 763, its trucks and tractors from 4 to 318, and its trailers from 4 to 458. Its all-motor tonnage has increased from 11,585 tons to 117,521 tons, and its joint rail-motor tonnage from 10,438 to 158,212 tons. The foregoing are, however, system figures which cover operations very much more extensive than those over the comparatively short route segments

here involved. Based upon a traffic and revenue study over a 7-day period in February 1946, the Transportation Company estimates that it handles 8,868,080 pounds of traffic yearly in all-motor service over the particular route seg- [fol. 657] ments here involved, and that the loss thereof would represent a loss of $73,118.76 in revenue. This admittedly, however, presupposes a total loss of such traffic and does not take into account the possibility of the tonnage being diverted to the Railroad and handled in service auxiliary or supplementary of train service.

The extent to which the company has entered the independent motor-carrier field in competition with other motor carriers in their own field is cogently indicated by the fact that from 44 to 49 percent of its total business is now all-motor traffic handled in operations wholly independent of train service. It maintains a full line of motor carrier rates which are published by various truck bureaus and is party to a number of motor carrier tariffs. It interlines about 30 percent of its truck traffic with other motor carriers. It daily transports shipments in all-motor service over such distances as from St. Louis to Dallas and from Kansas City to Memphis. In the same trucks it may and does, at the same time, transport shipments moving on all-motor billing and at all-motor rates together with shipments moving between the same points on rail billings and at rail rates different from the motor rates. The Railroad in turn transports shipments by rail which are moving on the Transportation Company's all-motor billing and at all-motor rates. It exercises complete discretion when shipments are tendered without an indication of the mode of service desired as to whether it will transport them by rail or by motor. It compensates the Transportation Company for its substituted service on a divisional basis at a rate per hundred pounds which is unaffected by the distance involved, and no study has been made to determine whether or not such rate is compensatory. The Transportation Company pays the Railroad no dividends, but does make certain payments to it for "general expenses" and for [fol. 658] materials and supplies obtained for it by the Railroad. About 100 of the Transportation Company's 250

stations are joint rail-motor stations, and the agents are joint employees of both companies.

As seen, the Transportation Company's case in each of the basic finance proceedings was built around an emphasized need for motor service with which rail service would be coordinated for the purpose of improving the rail service. The excerpts from the reports in those proceedings, quoted earlier herein, permit of no doubt that the purchases were approved, not for the purpose of permitting the company to engage in all-motor operations independent of its proprietary railroad, but solely to enable it to render a service auxiliary or supplementary to the rail service. This intent was neither obscurely nor uncertainly shown, for in each instance the tenor of the division's discussion and the specific reservation in the findings of the right to add restrictions for that purpose clearly disclosed what was being approved. Neither the Transportation Company nor its proprietary railroad had any reasonable justification for consummating transactions or making investments which would result in motor carrier operations in excess of those which were clearly auxiliary to or supplementary of the rail service. The reports in these cases are so clear on this point that the Transportation Company at the very least was put on notice as to the type of future operations which were contemplated and it cannot now escape the responsibility for proceeding in a different manner without first taking appropriate steps to remove any doubts it may have had. The Transportation Company could not [fol. 659] have been unaware of the discrepancy between the Commission's intent and its own practice. The Commission has found in the *Campbell Sixty Six case, supra,* that until its reserved right to restrict was, in fact, exercised, the Transportation Company lawfully conduct all-motor operations independently of the Railroad, but clearly it could not by expansion and development of such all-motor operations in the face of the Commission's obvious contrary intent build up a bar against the Commission's exercise now of its reserved right to restrict. There is no deprivation of property in the Commission's exercise of a right subject to which the investments were made in the beginning. The Transportation Company was on notice

from the beginning that its all-motor operations independent of the Railroad were of the type which had not been authorized by the Commission. Clearly, the circumstances negative any equitable or other basis for the perpetuation of its present practices. Indeed, it is the fact of the greatly expanded motor operations independent of rail that compels the exercise of the reserved right to impose conditions so as to return the operations to their proper and intended sphere—namely, a service auxiliary or supplementary to rail service. Compare the Supreme Court's decisions in the *Rock Island and Texas & Pacific cases, supra.*

To that end, condition 1 will be added to the certificates here involved, with the exception discussed immediately below.

Condition 2

This condition would limit the authorized service to points that are stations on the rail lines of the Railroad, and is calculated, together with condition 3, to implement and further the intent of condition 1. The only point on the routes embraced herein that is not a station on the rail [fol. 660] lines is Dyess, Ark., a small community located 7 miles from the nearest station. The examiners recommended that condition 2 be imposed on the involved operations except that it not be made applicable with respect to Dyess. The Transportation Company points out that the requirements of condition 1 would make it impossible to serve Dyess inasmuch as the Railroad would be unable lawfully to publish rail rates applicable to a non-rail point. There is merit in this contention, and in line with, and for the reasons stated in, this division's report in *Texas & Pac. Motor Transport Co. Ext.—Point Blue, La.*, 47 M.C.C. 425, neither condition 1 nor 2 will apply to operation to or from Dyess.

Condition 3

This condition, which as stated above supplements and implements condition 1, may take either of two forms. One form imposes a prior or subsequent rail-haul condition and the other designates so-called key points. In certain cases we have prescribed a rail-haul condition, generally where

for some reason the key-point restriction would have been ineffective. At first blush, the latter situation would appear to be presented with respect to the route from Hugo to Paris. This is a short route which is physically isolated from the other routes, and to name one or the other terminus as a key point would be meaningless; and to name both termini would render the operating right practically useless. On the other hand, a rail-haul condition would prevent the handling of the little local traffic moving over the route. In the circumstances, it is believed that neither form of condition 3 should be imposed as to this operation, particularly as the majority of the shipments will in all probability receive either a prior or a subsequent movement by rail. Accordingly, condition 3, which will be imposed on the routes involved herein, will be such as to have no applicability to the route from Hugo to Paris.

[fol. 661] It is believed that an immediately prior or immediately subsequent rail-haul condition on the other routes embraced herein might be unduly restrictive, and accordingly a key-point restriction will be imposed. To be effective, however, the latter restriction will necessarily require the naming of a number of points as key points which are not located on the particular routes here in issue but which are on connecting routes. The naming of such points will not, of course, operate as a limitation or diminution of the authorized operations over the latter routes, but solely as a limitation upon the service which may be performed over the routes embraced herein when used in connection with such other routes. Compare *Rock Island Motor Transit Co., Extension—Trenton, Mo.*, 43 M.C.C. 470.

The Transportation Company objects to the naming of Joplin and Carthage collectively as a single key point. It asserts that such designation would cost the Railroad approximately $3,000 per month, that it would delay approximately 66 tons of merchandise daily, that with the present train service there would be no way to move merchandise cars out of Joplin the same day loaded, that it would require additional cars to Joplin from Springfield and Tulsa, and that in the circumstances it would be preferable to return to all-rail service in the area.

The Joplin-Miami and Joplin-Carthage routes are connecting routes which parallel generally branch lines of the Railroad extending from Miami through Quapaw, Okla., and Baxter Springs, Kans., to Joplin, and thence to Carthage, including a loop line from Quapaw through Picher, Okla., to Baxter Springs. These lines connect with the main lines of the Railroad at four points at which less-than-carload freight can be interchanged: at Miami they connect with lines extending southwesterly to Tulsa, Oklahoma City, Dallas, and Fort Worth, Tex.; at Baxter Springs with lines extending northerly to Kansas City; and at [fol. 662] Carthage with lines extending westerly to Wichita, easterly to St. Louis and Memphis, and southerly to Fort Smith and Paris. The two routes combined traverse what is commonly known as the Tri-State area, consisting of the southwestern portion of Missouri, the southeastern portion of Kansas, and the northeastern portion of Oklahoma. Joplin, population 37,000, is the largest city and the main distributing center in the area. Carthage has a population of 11,000, Miami 8,000, Webb City 7,000, Picher 6,000, Baxter Springs 5,000, and Galena, Kans., 4,000. As previously indicated, the Joplin-Miami route constitutes a connecting segment between the Transportation Company's routes east of Joplin into Springfield, Kansas City, St. Louis, and Memphis, and those west of Miami into Oklahoma City and Dallas. Although it also has another unrestricted route between Joplin and Miami, granted since the further hearing herein, the route here under consideration when so used enables the Transportation Company to perform an all-motor service over extremely long routes between St. Louis, Memphis, and Kansas City, on the one hand, and Dallas and Oklahoma City, on the other. The naming of key points to restore the service, at least insofar as the subject route is used, to one that is truly auxiliary or supplementary to rail service is imperative. However, since operations are not now conducted over the formerly leased route between Kansas City and Fort Smith via Carthage, designation of the latter point is no longer required.

The Railroad's general practice is to transport its traffic as far as possible by rail before breaking bulk and substitut-

ing truck service. The points at which bulk is broken are determined primarily by the volume of the traffic, and by such other factors as train schedules and connections. For [fol. 663] several years St. Louis, Springfield, Tulsa, Oklahoma City, Dallas, Wichita, Kansas City, and Memphis have been consistent breakbulk points. At the time of the hearing it had certain other breakbulk points. For instance, (1) Afton and Madill, Okla., and Fort Smith and Joplin, are breakbulk points on merchandise cars moving from St. Louis, (2) Afton and Joplin on cars from Kansas City, (3) Ada, Okla., on cars from Tulsa, (4) Madill on cars from Springfield and Fort Worth, (5) Tulsa on cars from Enid, Okla., and Fort Smith, (6) and Springfield on cars from Fort Smith. A strictly merchandise train is operated from St. Louis and sets out cars at Springfield, Tulsa, Afton, Oklahoma City, and Dallas. It is claimed that the Railroad attempted to establish breakbulk points in the Tri-State area, for instance at Carthage, Baxter Springs, Columbus, Kans., Joplin, and Miami; but that the flow of traffic has prevented any of these points from being used as such completely. Of them, Joplin and Afton are the only points now used for this purpose, but neither is said to be a complete breakbulk point due to the fact that the traffic is generally westbound in the area, thus making it impossible to operate cars from Joplin or Afton. Accordingly, traffic from these points now moves by truck to Springfield. The need is demonstrated, however, for the key-point designation of Kansas City, Springfield, Joplin, and Tulsa. Operations are no longer conducted on the formerly leased routes extending to Fort Smith and Wichita, and in the circumstances those points are not now involved.

The *Memphis-Blytheville route* generally parallels the rail line between Memphis and Blytheville. At Blytheville the route connects with another motor route which parallels the rail line between Blytheville and St. Louis, approximately 235 miles. Key points on the latter route, southbound are St. Louis, Chaffee, Hayti, and Memphis, and northbound Memphis, Hayti, and St. Louis. At Memphis the route connects with three other motor routes extending to Walnut Ridge and Columbus. Operations over the [fol. 664] Jonesboro and Columbus routes were authorized

without restriction. As indicated, the Memphis-Walnut route connects at Memphis with the motor routes extending to Jonesboro, Columbus, and Blytheville. At Walnut Ridge it connects with a route extending north to Datto (from which point other routes extend to Cape Girardeau and Caruthersville, Mo.), and at Hoxie with routes extending northwest via Willow Springs, Mo., to Springfield and via Rolla, Mo., to St. Louis. The Walnut Ridge-Datto route is subject to a rail-haul condition; those between Datto, Cape Girardeau, and Caruthersville are subject to the key points of St. Louis, Chaffee, Hayti, and Blytheville; and those between Hoxie, Springfield, and St. Louis are subject to key-point restrictions at St. Louis and Memphis. The *Blytheville-Lake City route*, paralleling a branch line of the Railroad, connects at Blytheville with the routes previously described between St. Louis and Memphis. At the intermediate point of Leachville, Ark., it connects with a motor route extending north to Sikeston, Mo., a point on the St. Louis-Blytheville route, on which St. Louis, Chaffee, Hayti, and Blytheville are designated as key points. At Lake City it connects with a motor route to Nettleton, an intermediate point on the Memphis-Jonesboro route, which is subject to a rail-haul condition.

As indicated earlier herein, Memphis, St. Louis, and Springfield have long been rail breakbulk points. In addition, at the time of the further hearing the Railroad had breakbulk points (1) at Armory, Miss., Blytheville, Chaffee, and Hayti on cars moving from St. Louis, (2) at Amory, Chaffee, and Hayti on cars from Memphis, (3) at Jonesboro on cars from Springfield, and (4) at Amory on cars moving from Birmingham. A need clearly exists, if there is to be any certainty that only a bona fide auxiliary or supplementary service to rail is to be rendered, that Memphis, Willow Springs, and Blytheville be designated as [fol. 665] key points; that Jackson, Cape Girardeau, and Chaffee be designated collectively as a single key point; and that Amory, in order to prevent a by-passing thereof, and Tupelo, Miss., be designated collectively as a single key point. The fact that service is not authorized at Jackson does not affect the naming of it as a key point, as suggested by the Transportation Company, since it is on the

routes authorized and its location makes its designation necessary if the key point of Cape Girardeau is to be effective. The Transportation Company argues that the naming of Willow Springs, which is a small community and not a breakbulk point, would force the Railroad to abandon substituted service between Mountain Grove, Mo., and Walnut Ridge and certain intermediate points, require the use of additional cars between Memphis and Willow Springs and between Springfield and Willow Springs, and result in additional transfer, delay, and expense. The distance between Springfield and Memphis is about 297 miles, and there is a need therefore for the designation of some intermediate point as a key point if unduly long truck hauls are to be avoided. The designation of Willow Springs as a key point will not affect any of the carrier's operations *that do not involve also a movement over the routes which are the subject of the instant proceedings.* For instance, its operations between Springfield and Willow Springs and between Walnut Ridge and Willow Springs will be unaffected so long as the particular shipments do not move in part over the considered routes.

Conditions 4 and 5

Condition 4 would provide that all contractual arrangements between the Transportation Company and the Railroad shall be reported to the Commission and be subject to revision as found necessary in order that the arrangements shall be fair and equitable to the parties. In matters relating to compensation between the two companies, the Rail-
[fol. 666] road will in reality be dealing with itself and, so far as ultimate financial results to it are concerned, it is immaterial what these arrangements may be. It is important, however, that they be properly adjusted if the Commission and the general public are to know or have the means of ascertaining the cost to the Railroad of the services performed by the Transportation Company. Such information might be important in a rate proceeding or otherwise. See *Kansas City S. Transport Co., Inc., Com. Car. Application,* 10 M.C.C. 221. Accordingly, this condition should be imposed.

Condition 5, which will also be imposed, reserves to the Commission the right in the future to make such further changes or modifications in the conditions as may be necessary in order to make certain that the motor service remains auxiliary or supplementary to the rail service.

Upon further hearing, we find that the certificates issued to the Transportation Company in the proceedings listed in the appendix hereto, except No. MC-89913 (Sub-No. 10), were inadvertently issued; that such certificates should be revoked and at the same time new or amended certificates in conformity with the findings in the proceedings listed in the appendix hereto and which require that all future operations conducted thereunder shall be subject to the following limitations or restrictions, should be issued in lieu thereof; and that the certificate issued in No. MC-89913 (Sub-No. 10), should be modified so as to require that all future operations conducted thereunder shall be subject to the following limitations and restrictions:

1. The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, hereinafter called the Railway, except that this condition shall not apply with respect to Dyess, Ark.

[fol. 667] 2. Applicant shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

3. No shipments shall be transported by applicant between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla, Blytheville, Ark., Memphis, Tenn., and Amory-Tupelo (considered as one), Miss.

4. All contractual arrangements between applicant and the Railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary

in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the Railway.

An appropriate order will be entered.

[fol. 668] APPENDIX

PROCEEDINGS COVERED BY REPORT

No. MC-89913 (Sub-No. 1)	Frisco Transportation Company Extension—Joplin-Miami.
No. MC-89913 (Sub-No. 2)	Frisco Transportation Company Extension—Hugo to Paris.
No. MC-89913 (Sub-No. 3)	Frisco Transportation Company Extension—Joplin-Carthage.
No. MC-89913 (Sub-No. 5)	Frisco Transportation Company Extension—Memphis-Blytheville.
No. MC-89913 (Sub-No. 6)	Frisco Transportation Company Extension—Memphis-Walnut Ridge.
No. MC-89913 (Sub-No. 10)	Frisco Transportation Company Extension—Blytheville-Lake City.
No. MC-F-578	Frisco Transportation Company—Purchase—Joseph D. Cooper. Prior Report: 15 M.C.C. 317.
No. MC-F-618	Frisco Transportation Company—Purchase—John Hamm. Prior Report: 15 M.C.C. 320.
No. MC-F-619	Frisco Transportation Company—Purchase—J. A. Rose. Prior Report: 15 M.C.C. 323.

No. MC-F-678 — Frisco Transportation Company—Purchase—Joseph W. Parker. Prior Report: 25 M.C.C. 96.

No. MC-F-679 — Frisco Transportation Company—Purchase—Louis Tolson. Prior Report: 25 M.C.C. 96.

[fol. 669] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 22nd day of October, A. D. 1951.

No. MC-89913 (Sub-No. 1)
FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-MIAMI

No. MC-89913 (Sub-No. 2)
FRISCO TRANSPORTATION COMPANY EXTENSION—HUGO TO PARIS

No. MC-89913 (Sub-No. 3)
FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-CARTHAGE

No. MC-89913 (Sub-No. 5)
FRISCO TRANSPORTATION COMPANY EXTENSION—MEMPHIS-BLYTHEVILLE

No. MC-89913 (Sub-No. 6)
FRISCO TRANSPORTATION COMPANY EXTENSION—MEMPHIS-WALNUT RIDGE

No. MC-89913 (Sub-No. 10)
FRISCO TRANSPORTATION COMPANY EXTENSION—BLYTHEVILLE-LAKE CITY

No. MC-F-578
FRISCO TRANSPORTATION COMPANY—PURCHASE—JOSEPH D. COOPER

No. MC-F-618
FRISCO TRANSPORTATION COMPANY—PURCHASE—JOHN HAMM

No. MC-F-619
FRISCO TRANSPORTATION COMPANY—PURCHASE—
J. A. ROSE

No. MC-F-678
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH W. PARKER

No. MC-F-679
FRISCO TRANSPORTATION COMPANY—PURCHASE—
LOUIS TOLSON

It appearing, That in the foregoing proceedings, the Commission, division 5, issued certificates of public convenience and necessity to the Frisco Transportation Company authorizing it to conduct certain motor-carrier operations in interstate or foreign commerce;

It further appearing, That, upon consideration of the records and of the petition of the Frisco Transportation Company for hearing, said proceedings were reopened for further hearing solely with respect to certain matters;

And it further appearing, That investigation of the matters and things involved in these proceedings having been made and the said division, on the date hereof, having made and filed a report on further hearing herein containing its findings of fact and conclusions thereon, which report and the prior reports in the above proceedings are hereby made a part hereof, and said proceedings having been duly submitted:

[fol. 670] *It is ordered,* That the certificates issued in said proceedings, except No. MC-89913 (Sub-No. 10), be, and they are hereby, revoked; that new or amended certificates in conformity with the findings in Nos. MC-F-578, MC-F-618, MC-F-619, MC-F-678 and MC-F-679 and which require that all future operations conducted thereunder shall be subject to the limitations or restrictions set forth in the findings in said report on further hearing herein be issued in lieu of those revoked; that the certificate issued in No. MC-89913 (Sub-No. 10) be, and it is hereby, modified so as to require that all future operations conducted there-

under shall be subject to the conditions set forth in said report on further hearing; and that an amended certificate so modified be issued to the Frisco Transportation Company.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(Seal)

[fol. 671] Order

Interstate Commerce Commission

No. MC-89913 (Sub-No. 1)
Frisco Transportation Company Extension—
Joplin-Miami

No. MC-89913 (Sub-No. 2)
Frisco Transportation Company Extension—
Hugo to Paris

No. MC-89913 (Sub-No. 3)
Frisco Transportation Company Extension—
Joplin-Carthage

No. MC-89913 (Sub-No. 5)
Frisco Transportation Company Extension—
Memphis-Blytheville

No. MC-89913 (Sub-No. 6)
Frisco Transportation Company Extension—
Memphis-Walnut Ridge

No. MC-89913 (Sub-No. 10)
Frisco Transportation Company Extension—
Blytheville-Lake City

No. MC-F-578
Frisco Transportation Company—Purchase—
Joseph D. Cooper

No. MC-F-618
Frisco Transportation Company—Purchase—
John Hamm

No. MC-F-619

FRISCO TRANSPORTATION COMPANY—PURCHASE—
J. A. ROSE

No. MC-F-678

FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH W. PARKER

No. MC-F-679

FRISCO TRANSPORTATION COMPANY—PURCHASE—
LOUIS TOLSON

PRESENT: William E. Lee, Commissioner, to whom the matters which are the subject of this order have been assigned.

Upon consideration of the records in the above-entitled proceedings, and of request of applicant for an extension of time within which to file petition for reconsideration, rehearing, or reargument of the findings in the report and order of Division 5 of October 22, 1951; and good cause appearing therefor:

It is ordered, That the time within which petitions for reconsideration, rehearing, or reargument may be filed be, and it is hereby, extended to February 4, 1952.

It is further ordered, That replies to petitions may be filed by any party of record on or before February 14, 1952.

Dated at Washington, D. C., this 26th day of November, A. D. 1951.

By the Commission, Commissioner Lee.

W. P. BARTEL,
Secretary.

(SEAL)

[fol. 672] ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of July, A. D., 1952.

No. MC-89913 (Sub-No. 1)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

No. MC-89913 (Sub-No. 2)
FRISCO TRANSPORTATION COMPANY EXTENSION—
HUGO TO PARIS

No. MC-89913 (Sub-No. 3)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-CARTHAGE

No. MC-89913 (Sub-No. 5)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-BLYTHEVILLE

No. MC-89913 (Sub-No. 6)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-WALNUT RIDGE

No. MC-89913 (Sub-No. 10)
FRISCO TRANSPORTATION COMPANY EXTENSION—
BLYTHEVILLE-LAKE CITY

No. MC-F-578
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH D. COOPER

No. MC-F-618
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOHN HAMM

No. MC-F-619
FRISCO TRANSPORTATION COMPANY—PURCHASE—
J. A. ROSE

No. MC-F-678
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH W. PARKER

No. MC-F-679
FRISCO TRANSPORTATION COMPANY—PURCHASE—
LOUIS TOLSON

Upon consideration of the records in the above-entitled proceedings, and of:

(1) Petition of applicant for reconsideration and oral argument, dated February 1, 1952;

(2) Reply of Campbell Sixty-Six Express, Inc., intervener in opposition, filed March 31, 1952;

(3) Joint reply of American Trucking Associations, Inc., and Regular Common Carrier Conference of American Trucking Associations, Inc., interveners, dated April 1, 1952;

and good cause appearing therefor:

[fol. 673] *It is ordered,* That said proceedings be, and they are hereby, reopened for oral argument at a time and place to be hereafter fixed.

By the Commission.

W. P. BARTEL,
Secretary.

(SEAL)

[fol. 674] PLAINTIFF'S EXHIBIT 2

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

I, HAROLD D. McCOY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is true copy of Report and Order of the Commission, filed and entered December 7, 1953, in No. MC-89913 (Sub-No. 1), Frisco Transportation Company Extension—Joplin-Miami, et al, the original of which is now on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 11th day of June, A. D. 1956.

/s/ HAROLD D. McCOY
SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

(SEAL)

[fol. 675] PLAINTIFF'S EXHIBIT 2

M-7669

INTERSTATE COMMERCE COMMISSION

No. MC-89913 (SUB-NO. 1)[1]

FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-MIAMI

Decided December 7, 1958

Upon oral argument, findings in prior report, 53 M. C. C. 415, modified. Certain certificates heretofore issued to Frisco Transportation Company canceled on finding that they were inadvertently issued. Conditions imposed in certificates authorized to be issued in lieu of those canceled and in certificate No. MC-89913 (Sub-No. 10) in order to insure that the service rendered thereunder shall in the future be limited to that which is auxiliary to, or supplemental of, rail service. Other prior reports: 15 M. C. C. 317, 15 M. C. C. 320, 15 M. C. C. 323, 25 M. C. C. 96, 35 M. C. C. 132, and 35 M. C. C. 802.

Appearances as shown in prior reports and, in addition, *J. E. McCullough* for a transportation company; and *James F. Pinkney* for an intervener in opposition.

REPORT OF THE COMMISSION ON ORAL ARGUMENT

BY THE COMMISSION:

These proceedings involve principally the issue of whether certain certificates heretofore issued the Frisco Transportation Company, a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, hereafter called the Transportation Company and the railroad, respectively, were inadvertently issued.

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[1] This report embraces the proceedings listed in appendix A hereto.

In its report on further hearing, 53 M. C. C. 415, division 5 found that the certificates issued to the Transportation Company in the proceedings listed in part I of appendix A hereto, except No. MC-89913 (Sub-No. 10), were inadvertently issued; that such certificates should be revoked and at the same time new or amended certificates in conformity with the findings in the proceedings listed in part II of appendix A hereto and which require that all future operations conducted thereunder shall be subject to the limitations or restrictions set forth in appendix B hereto, should be issued in lieu thereof; and that the certificate issued in No. MC-89913 (Sub-No. 10), should be modified so as to require that all future operations conducted thereunder shall be subject to the limitations or restrictions as described in appendix B.

Upon petition of the Transportation Company, to which Campbell Sixty-Six Express, Inc., an intervener in opposi-[fol. 676]tion, and the American Trucking Associations, Inc., and Regular Common Carrier Conference of the American Trucking Associations, Inc., interveners, replied, for good cause shown, by order entered July 7, 1952, we reopened the proceedings and the parties have been heard in oral argument. The facts are set forth in the prior report on further hearing, 53 M. C. C. 415, in considerable detail and need be restated herein only to the extent necessary for clarity of discussion and a determination of the issues presented by the petitions and at the oral argument.

The Transportation Company holds certificates authorizing motor common carrier operations over an extensive system of regular routes in Missouri, Arkansas, Tennessee, Mississippi, Kansas, Oklahoma, and Texas. More specifically, its routes extend from St. Louis, Mo., on the northeast, Memphis, Tenn., and Columbus, Miss., on the southeast, and Kansas City, Mo., on the north, to Oklahoma City, Okla., and Dallas, Tex., on the southwest. They aggregate several thousand miles, of which about 284 miles are involved in the subject proceedings. Although these authorized routes parallel generally the lines of the railroad, there are substantial segments which reach or traverse a considerable area not served by the railroad, and in a number of instances connect divergent rail lines. All of the

routes, except about three, were acquired through the purchase of the operating rights of various independent motor carriers. The character of the operations authorized over the system in general will be described briefly in order that the matters here in issue may be more fully understood. No restrictions limiting the operations to a rail auxiliary or supplementary service[2] are imposed on the routes (1) between St. Louis and Carthage, Mo., via Springfield, (2) between Kansas City and Springfield, (3) between Lebanon and Collins, Mo., which connects the two preceding routes north of Springfield, (4) between Alma, Ark., and Springfield, (5) between Dallas, Oklahoma City, and Miami, Okla., (6) between Memphis and Columbus, and (7) between Jonesboro, Ark., and Memphis. Operations over these routes are, however, in certain instances limited to service at rail stations or at points not more distant than 10 miles from rail stations of the railroad. The routes between St. Louis and Hoxie, Ark., via Cabool, Mo., partly over the route described in (1) above, and between Springfield and Cabool are subject to two restrictions. One limits the service to points within 10 miles of rail stations, and the other designates St. Louis and Memphis as key points.[3] Extending from the last-named routes are routes into Van Buren and Mountain View, Mo., operation over which [fol. 677] is also subject to key-point restrictions at St. Louis and Memphis. The routes between St. Louis and Blytheville and certain other points in Arkansas and Missouri are subject to all of the conditions usually imposed in operations of this character, including the designation of St. Louis, Chaffee and Hayti, Mo., and Blytheville as key points and a restriction against transporting shipments by truck between St. Louis and points south or west of Chaffee.

[2] Such a restriction permits only all-motor movements in the handling of rail traffic at railroad rates and on railroad bills of lading. See *Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M. C. C. 721, 726.

[3] The key-point restriction precludes the transportation of shipments between the points designated as key points, or through, or to, or from, more than one such point.

The usual conditions, including a rail-haul condition,[4] are also applicable on the routes between Datto and Walnut Ridge, Ark., between Lake City and Nettleton, Ark., and between Marked Tree and West Ridge, Ark.

The six certificates involved in the instant proceedings are listed in part I of appendix A. These certificates, except No. MC-89913 (Sub-No. 10), were issued pursuant to approved purchases of the operating rights of several independent motor carriers as shown in part II of appendix A. The certificate in No. MC-89913 (Sub-No. 10) was issued pursuant to the purchase approved in No. MC-F-1037 and it alone contains a specific condition subjecting the operations to such future limitations as we may find necessary to impose in order to insure that the service performed shall be auxiliary to, or supplemental of, rail service. The circumstances leading to the issuance of each of these six certificates are discussed in considerable detail in the prior report beginning at page 418 and we see no need to repeat them here. Briefly, division 5 approved the purchases by the Transportation Company of the operating rights (1) of John Hamm between Miami and Joplin, Mo., (2) of J. A. Rose from[5] Hugo, Okla., to Paris, Tex., (3) of Joseph D. Cooper between Joplin and Carthage, Mo., (4) of Joseph W. Parker between Blytheville and Memphis, (5) of Louis Tolson between Walnut Ridge and Memphis, and (6) of T. N. Bennett between Lake City and Blytheville. The operating rights so purchased were later assigned Nos. MC-89913 (Sub-No. 1), MC-89913 (Sub-No. 2),

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[4] The rail-haul condition requires that the shipments transported by truck receive an immediately prior or immediately subsequent movement by rail.

[5] Pursuant to the findings in *Frisco Transp. Co. Common Carrier Application*, 18 M. C. C. 826, a certificate, No. MC-89913, was issued the Transportation Company on March 2, 1940, authorizing it to transport general commodities, with exceptions, from Paris to Hugo, serving all intermediate points. The findings in that proceeding do not contain any restriction as to the character of service authorized, or any reservation of a right later to restrict in any manner. On March 31, 1942, a consolidated certificate was issued the Transportation Company embracing the operating authority granted pursuant to the findings in the cited proceeding and those acquired through purchase from J. A. Rose.

MC-89913 (Sub-No. 3), MC-89913 (Sub-No. 5), MC-89913 (Sub-No. 6), and MC-89913 (Sub-No. 10), respectively.

In each of the proceedings approving the above-described purchases (see part II of appendix A), a finding was made [fol. 678] that the purchase would be consistent with the public interest, that it would promote the public interest by enabling the railroad to use service by motor vehicle to public advantage in its operations, and that it would not unduly restrain competition. In each instance, however, the approval was made subject to a definite proviso reserving the right to impose such limitations or restrictions as the Commission might find necessary in order to insure that the service performed "shall be auxiliary or supplementary to the train service" of the railroad, and shall not unduly restrain competition. The certificate issued in each of these proceedings except in No. MC-89913 (Sub-No. 10) does not contain this limitation. The certificate in No. MC-89913 (Sub-No. 10), although it carries no restriction as to the character of the motor service authorized, does contain a specified reservation of a right in this Commission later to restrict for the purpose indicated.

Before discussing the matters raised on petition and at the oral argument, it may be well to review briefly the events which preceded the instant proceedings. In July 1941, Campbell Sixty-Six Express, Inc., and certain other motor common carriers filed a complaint alleging that the Transportation Company, with the cooperation of the railroad, was conducting certain operations as a motor common carrier, in interstate or foreign commerce, in violation of section 206 (a) and other sections of the Interstate Commerce Act, and has willfully failed to comply with our orders, rules, and regulations governing motor common carrier operations. In *Campbell Sixty-Six Exp., Inc.* v. *Frisco Transp. Co.*, 43 M. C. C. 641, a majority of division 5 found that certain certificates under which the Transportation Company was operating authorized the performance only of service which was strictly auxiliary or supplementary to the rail service of the railroad, and that the performance of a direct motor-carrier service to the public was unauthorized and should be discontinued. No order was entered, but the division stated that certain proceedings in which

certificates were issued to the Transportation Company would be reopened for the purpose of determining what, if any, conditions or restrictions should be imposed in the certificates to remove all doubt about the character of operations which the Transportation Company was authorized to acquire and in which it is authorized to engage. Subsequently, division 5, on its own motion, reopened the proceedings covered by this report for reconsideration and thereafter they were reopened for further hearing. In our report on oral argument in *Campbell Sixty-Six Exp., Inc.*, v. *Frisco Transp. Co.*, 46 M. C. C. 222, hereafter called the *Campbell Sixty-Six* case, we disapproved the division's finding that the Transportation Company had been engaged in operations unauthorized by the certificates as then phrased, but stated (page 225):

> [fol. 679] Nothing that we say here, however, should be taken as an indication that the certificates now held by the Transportation Company may not be corrected to reflect the intent of the findings in the acquisition proceedings or that restrictions may not be imposed now in some or all of the certificates held by the Transportation Company which will have the effect of limiting the service thereunder to that which is auxiliary to or supplementary of the rail service of its parent company and preclude it from performing a direct and independent motor common carrier service. Whether the certificates held by the Transportation Company, which do not contain the conditions imposed in the acquisition proceedings, were inadvertently issued is not here determined. Since the prior report, a number of the proceedings pursuant to which certificates were issued to The Transportation Company have in fact been reopened for further hearing. The conditions, if any, which may and should be imposed will be considered in the reopened proceedings.

As seen, the certificate issued to the Transportation Company in No. MC-89913 (Sub-No. 10) contains a provision stating that the operations authorized are subject "to such further limitations, restrictions, or modifications" as we may find it necessary to impose, in order to insure that the

service "shall be auxiliary or supplementary to the train service" of the railroad. There is now no question that we may, if we find it necessary, impose limitations or restrictions as to the service to be rendered under this certificate. See *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, hereafter called the *Rock Island* case. Whether any limitations or restrictions should be imposed will be hereinafter discussed.

The first and most important issue to be determined is whether the omission from the certificates issued to the Transportation Company in Nos. MC-89913 (Sub-No. 1), MC-89913 (Sub-No. 2), MC-89913 (Sub-No. 3), MC-89913 (Sub-No. 5), and MC-89913 (Sub-No. 6), of the condition imposed by division 5 in its findings in the finance reports, reserving the right to impose such further limitations or restrictions as we may find necessary to impose in order to insure that the service shall be auxiliary or supplementary to train service, prevents us from exercising that right without contravening the provisions of section 212 (a)* of the Interstate Commerce Act. The division found that the certificates here in issue, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division author- [fol. 680] ized the purchase; that to the extent that the certificates issued fail to reflect the character of authority contemplated by the findings, such deficiency or deviation from the findings was inadvertent and, consequently, the certificates, departing as they do from the findings in the finance reports, were inadvertently issued; that under these circumstances the certificates may be revoked, and certifi-

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*Section 212 (a) provides in substance that certificates shall remain in effect until suspended or terminated as provided in the section. They may "upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, * * *." It further provides for a minimum of 30 days in which the holder may comply with a lawful order commanding obedience thereto.

cates in accord with such findings may be issued, without proceeding in accordance with the provisions of section 212 (a); and that no diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved.

In its petition, the Transportation Company renews its motion to discontinue the instant proceedings and also renews its objections to certain evidence adduced at the hearing. The motion to discontinue the proceedings is based on the ground that the Transportation Company made no request for the hearing; that the notice thereof did not inform it of the purpose of the hearing; that it has not had a full hearing; that no evidence has been adduced to show the need for the imposition of the conditions set forth in appendix B attached; and that it has been denied due process of law. Whether or not the Transportation Company requested the hearing is of no moment, for our power to reopen the instant proceedings is not dependent upon a request therefor by it. Some of the other contentions were discussed by the division in the prior report on page 422. We see no need to repeat them herein. Further, no arguments have been advanced by the Transportation Company which would cause us to reverse the above-mentioned rulings of the examiner and of the division. In the circumstances, they are affirmed.

The Transportation Company argues that the claimed inadvertence in the issuance of the certificates is contrary to the law and to the facts. The facts leading to the issuance of the certificates in question are relatively simple, are not disputed, were set forth in some detail in the prior report, and have been reviewed briefly herein. As heretofore stated, division 5, after formal hearings, authorized the Transportation Company to purchase the operating rights heretofore described, but in each instance, however, "the approval was made subject to a definite proviso reserving" the right to impose such limitations or restrictions as we might find necessary in order to insure that the service performed "shall be auxiliary or supplementary to the train service" of the railroad. Except with respect to the certificate issued in No. MC-89913 (Sub-No. 10), none of the certificates contain such a limitation. The

Transportation Company points out, and correctly so, that in each of the proceedings included herein except in No. MC-89913 (Sub-No. 10), a so-called compliance order was [fol. 681] issued by division 5 in each such proceeding shortly after the authorized purchase had been consummated. Thus, so-called compliance orders were issued in March 1939, in No. MC-89913, subnumbers 1, 2, and 3, in June 1939, in No. MC-89913 (Sub-No. 5), and in July 1939, in No. MC-89913 (Sub-No. 6). These compliance orders do not contain the above-described limitation, hereafter called the limitation, which was contained in the findings in each of the finance proceedings. The Transportation Company argues in effect that the certificates issued were based on the compliance orders and therefore that they were not inadvertently issued, citing in support thereof, *Hudson Bus Transp. Co., Inc., Common Carrier Application,* 46 M. C. C. 9.

In the cited case, certain carriers petitioned for the revocation of Hudson's certificate on the ground that it inadvertently omitted a seasonal restriction and failed to specify certain streets over which the operation was to be conducted. Division 5, following the principle of the findings in *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465, 42 M. C. C. 211, held that a certificate which has been issued and allowed to become final and effective without objection by interested parties, is conclusive against protestants in the absence of fraud, misrepresentation, or inadvertence on the part of the Commission, in other words that there has to be an end to litigation. The division found that the fact "that Hudson was found entitled to a somewhat different and larger operating authority than that originally requested by its predecessors does not constitute error, for our power to grant authority in excess of that requested by them is clear." In effect, therefore, the division found, which is not the case here, that the certificate described the exact operations it had intended to authorize. There was no fraud or misrepresentation, and no inadvertence in the issuance of the certificate to Hudson. Pertinent in this connection is the following comment in respect of the correction of errors from the Supreme Court's decision in *United States* v. *Seatrain Lines, Inc.,* 329 U. S. 424:

> We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct. * * * Thus, it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the *Foss* case. * * *

Acceptance by the Court of our power to revise a certificate which was inadvertently issued is clearly implied in this language. As seen, however, it held only that our action there did not involve the mere correction of a clerical error, but represented an effort to invoke a newly conceived policy. [fol. 682] As pointed out by the Transportation Company, none of the compliance orders issued in No. MC-89913, subnumbers 1, 2, 3, 5, and 6, hereafter collectively called the five proceedings, contained the limitation. The limitation, however, was specifically included in the findings in each of the finance proceedings wherein the division authorized the Transportation Company to purchase certain motor-carrier rights. Thus the error, if it be an error, occurred first in the compliance orders. The certificates issued in each of the five proceedings merely followed the compliance orders and do not include the limitation.

Admittedly, in each of the finance proceedings the Transportation Company disclosed a desire, if permitted to do so, to continue all-motor service independently of the railroad, but in each proceeding it built its case primarily on the railroad's need for an auxiliary motor service, which would enable the railroad to improve its less-than-carload rail freight service, and upon the public benefits to be derived from a coordinated motor-rail service. In each case, division 5 disapproved the proposed independent all-motor operations and approved the proposed acquisitions only to enable the Transportation Company to perform service auxiliary to, or supplemental of, the rail service of the railroad, as is abundantly shown by the discussion in each report. As heretofore stated, approval of the purchase in each instance was made subject to the limitation. There is

now no question that approval of motor-carrier operating rights by a railroad purchaser may be conditioned on the said purchaser's "willingness to accept a narrower certificate than that possessed by the seller." See the *Rock Island* case, *supra*. In none of the finance proceedings authorizing the purchases here in issue did the Transportation Company object to the conditions upon which the purchases were approved and, as seen, it consummated the transactions shortly after the approval in each instance.

May the findings of each of the finance proceedings specifically authorizing the approval of the purchase subject to the limitation be changed so as to eliminate any condition contained in the findings, except through a formal supplemental report, report on reconsideration, or a modifying order in the specific proceeding authorizing the said purchase? We think not. It would neither be fair nor equitable to the parties to the proceeding or to the general public to permit any such change other than in the manner specified. There has not been any type of report or order modifying the findings in any of the finance proceedings listed in part II of appendix A. The compliance order issued in each of the five proceedings sets forth the operating rights which the Transportation Company had been authorized to purchase, and in each instance omitted the limitation. In other [fol. 683] words, each of the compliance orders and of necessity the certificates based thereon authorized operations greater than those for the performance of which the division authorized the purchase.

We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. Under these circumstances the certificates may be revoked, and certificates in accord with such findings issued, without proceeding in accordance with the provisions of section 212 (a). No diminution of any authority

actually authorized to be purchased, nor any partial revocation of any such authority, is involved.

We might properly revoke or amend the certificates, except that issued in the No. MC-89913 (Sub-No. 10), and issue new or amended certificates containing a specific recital of the reserved right to impose further limitations or restrictions to insure that future service of the Transportation Company over the routes here involved shall be limited to service which is auxiliary or supplementary to the rail service of the railroad, and then, after issuance of such new or amended certificates, consider the further question whether the reserved right should be exercised, and, if we should find that it should be exercised, thereafter issue amended certificates containing such further limitations or restrictions. Such a course, would, however, be unnecessarily cumbersome considering the fact that a full and fair hearing already has been held for the purpose of determining what, if any, limitations or restrictions should be imposed. In view of this we shall proceed now, as did the examiner and the division, to the broader question as to whether we should exercise the reserved right and impose limitations or restrictions. We have usually imposed five conditions in certificates authorizing auxiliary or supplementary service, and these will now be discussed separately in the light of the evidence of record.

Condition 1

This condition, if imposed, would in general terms limit the character of service which the Transportation Company may perform to that which is "auxiliary to, or supplemental of," the rail service of the railroad. These terms were defined in *Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M. C. C. 721, and approved in the *Rock Island* case and others. Further explanation here is unnecessary. [fol. 684] The Transportation Company vigorously opposes this condition, contending that in reliance upon its unrestricted certificates and upon certain correspondence with our Bureau of Motor Carriers relative to the filing of tariffs which indicated that its status was to be that of an ordinary motor carrier, it greatly expanded its operations in the years following its acquisitions; and that to restrict them

now to a service solely auxiliary or supplementary to train service would destroy its investment, and in effect constitute the taking of its property without the process of law.

At the time of the hearing, the Transportation Company's assets had increased from $109,540 to $1,083,871, and its capital stock investment from $100,000 to $450,000. Its employees increased from 4 to 763, its trucks and tractors from 4 to 318, and its trailers from 4 to 458. Its all-motor tonnage has increased from 11,585 tons to 117,521 tons, and its joint rail-motor tonnage from 10,438 to 158,212 tons. The foregoing are, however, system figures which cover operations very much more extensive than those over the comparatively short route segments here involved. Based upon a traffic and revenue study over a 7-day period in February 1946, the Transportation Company estimates that it handles 8,868,080 pounds of traffic yearly in all-motor service over the particular route segments here involved, and that the loss thereof would represent a loss of over $73,100 in revenue. This admittedly, however, presupposes a total loss of such traffic.

We do not believe that the record justifies a conclusion that there will be a total loss of the above-described traffic. It may be that some of the tonnage will be diverted to the railroad and handled by the Transportation Company. Nor does the record justify a conclusion that imposing condition 1 in the certificates as set forth in our findings herein would destroy the Transportation Company's investment. As stated, the Transportation Company holds certificates authorizing operations over several thousand miles of routes, of which about 284 miles are involved in the instant proceedings. That the imposition of condition 1 in the certificates named in the findings herein will have some effect on the Transportation Company's investment is obvious. That the Transportation Company could not have been unaware that there was some question concerning the type of operation it could render under the rights which it was authorized to purchase in the finance proceedings listed in part II of appendix A is, we believe, also obvious. First, the findings in each of the finance proceedings in question specifically authorized the approval of the purchases subject to the limitation. Later, the type of operations conducted

by the Transportation Company were the subject of a complaint in the *Campbell Sixty-Six* case heretofore dis- [fol. 685] cussed. In the circumstances, the Transportation Company at the very least was put on notice that there were questions concerning the type of operations which it could perform and it cannot now successfully claim any equities because of its having made investments without first taking appropriate steps to remove the doubts which existed. Concerning the imposition of condition 1 and the other conditions generally set forth in appendix B attached, the Supreme Court in the *Rock Island* case stated:

> The Commission has continually evidenced * * * by opinion and certification its intention to have rail-owned motor carriers serve in auxiliary and supplemental capacity to the railroads.
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> * * * * * * * *
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> Such restrictions hamper railroad companies in the use of their physical facilities—stations, terminals, warehouses—their personnel and their capital in the development of their transportation enterprises to encompass all or as much of motor transportation as the roads may desire. The announced transportation policy of Congress did not permit such development. [Footnote omitted.] We hold the new conditions are within the limits covered by the reservation of power to impose such further limitations as might be found necessary "to insure that the service shall be auxiliary or supplementary to the train service" of The Chicago, Rock Island and Pacific Railway Company.

We conclude that appropriate conditions should be imposed in the certificates held by the Transportation Company so as to return the operations to their proper and intended sphere, namely, a service auxiliary or supplementary to rail service. To that end, condition I will be added to the certificates here involved, with the exception discussed immediately below and with the exception of the certificate in No. MC-89913 (Sub-No. 2). The latter certificate, as seen, involves only an operation from Hugo to Paris, a distance of some 26 miles, and is physically isolated from

the other routes. The Transportation Company's certificate in No. MC-89913 covers the operation in the reverse direction, namely, from Paris to Hugo, and authorizes service to and from all intermediate points. The certificate in No. MC-89913 contains no limitations or restrictions of any kind nor does it contain any reserved right to restrict. In the circumstances, the certificate issued in No. MC-89913 (Sub-No. 2) will not be revoked and the further discussion herein does not of course apply to such certificate.

Condition 2

This condition would limit the authorized service to points that are stations on the rail lines of the railroad, and is calculated, together with condition 3, to implement and further the intent of condition 1. The only point on the routes embraced herein that is not a station on the rail lines is Dyess, Ark., a small community located 7 miles from [fol. 686] the nearest station. The division found that condition 2 should be imposed on the involved operations except that neither condition 2 nor 1 should apply to operations to or from Dyess for the reasons stated in *Texas & Pac. Motor Transport Co. Ext.—Point Blue, La.*, 47 M. C. C. 425.

The Transportation Company points out that to serve Dyess as an "independent motor carrier" means that that town would necessarily appear in many motor-carrier tariffs to which it is a party and that it would entail considerable expense. The Transportation Company contends that it is impractical and uneconomical to "hold out" to perform one kind of service at a small town like Dyess and another and restricted service at other contiguous points. If the Transportation Company does not desire to continue serving Dyess, it may of course request permission to abandon and discontinue such service and for cancellation of its authority in this respect. Permission has been granted in those instances where it is shown that the public interest would not be injuriously affected by the abandonment. See *Frisco Transp. Co. Extension—Lake City, Ark.*, 42 M. C. C. 677.

CONDITION 3

As stated above, this condition supplements and implements condition 1. The division found that a key-point restriction should be imposed. The division further found that to be effective the latter restriction necessarily requires the naming of a number of points as key points which are not located on the particular routes here in issue but which are on connecting routes; and that the naming of such points will not operate as a limitation or diminution of the authorized operations over the latter routes, citing *Rock Island Motor Transit Co. Extension—Trenton, Mo.*, 43 M. C. C. 470. It named the key points listed in condition 3 of appendix B.

In its petition, the Transportation Company in particular objects to the naming of any key points not located on the routes here in issue. It asserts that the key points named by the division would prohibit it from transporting freight at motor rates and on motor billing (1) between St. Louis or Kansas City and Oklahoma City or Dallas by utilizing the routes authorized in Nos. MC-89913 (Sub-No. 1) and MC-89913 (Sub-No. 3), and (2) betwen Kansas City or Springfield and Memphis by utilizing the routes authorized in Nos. MC-89913 (Sub-No. 5) and MC-89913 (Sub-No. 6). It argues that its right to serve between St. Louis or Kansas City and Oklahoma City or Dallas or between Kansas City or Springfield and Memphis, did not arise under any of the certificates here in issue, but that such right was authorized in *Frisco Transp. Co.—Purchase—Reddish*, 35 [fol. 687] M. C. C. 132, *Frisco Transp. Co.—Purchase—Ozark Truck Lines, Inc.*, 35 M. C. C. 255, and others, wherein it was authorized to purchase certain operating rights which were "authorized to be unified with rights otherwise confirmed in applicant [the Transportation Company]."

The above argument is without merit. The Joplin-Miami route is one of the routes embraced in the instant proceedings and constitutes, for example, a connecting segment between the Transportation Company's routes east of Joplin into Springfield, Kansas City, St. Louis, and Memphis, and those west of Miami into Oklahoma City and Dallas. In other words, the Joplin-Miami route must be used to enable the Transportation Company to perform an all-

motor service over the extremely long routes between St. Louis, Memphis, and Kansas City, on the one hand, and Dallas and Oklahoma City on the other. For the reasons heretofore discussed, we concluded that the certificate, No. MC-89913 (Sub-No. 1), covering the Joplin-Miami route, was indavertently issued, in that it did not contain a specific recital of the reserved right to impose further limitations or restrictions to insure that future service of the Transportation Company over this route shall be limited to service which is auxiliary or supplementary to the rail service of the railroad. The naming of key points is necessary to insure that the future service over the routes shown in the findings herein will be truly auxiliary or supplementary to rail service. The key points named herein will not affect any of the Transportation Company's operations "that do not involve also a movement over the routes which are the subject of the instant proceedings."

For the reasons discussed at some length by the division in its report beginning at page 431, it concluded that the key points listed in appendix B attached should be named. With the exception noted above, neither the Transportation Company nor any other party has raised any specific questions concerning the key points named by the division. In the circumstances, we conclude that the findings of the division respecting the named key points should be affirmed.

Conditions 4 and 5

Condition 4 provides that all contractual arrangements between the Transportation Company and the railroad shall be reported to us and be subject to revision as found necessary in order that the arrangements shall be fair and equitable to the parties. In matters relating to compensation between the two companies, the railroad will in reality be dealing with itself and, so far as ultimate financial results to it are concerned, it is immaterial what these arrangements may be. It is important, however, that they be [fol. 688] properly adjusted if this Commission and the general public are to know or have the means of ascertaining the cost to the railroad of the services performed by the Transportation Company. Such information might be important in a rate proceeding or otherwise. See *Kansas City*

S. Transport Co., Inc., Com. Car. Application, 10 M. C. C. 221. Accordingly, this condition should be imposed.

Condition 5, which will also be imposed, reserves to us the right in the future to make such further changes or modifications in the conditions as may be necessary in order to make certain that the motor service remains auxiliary or supplementary to the rail service.

FINDINGS

Upon oral argument:

We find that the certificates issued to the Frisco Transportation Company in the proceedings listed in part I of appendix A hereto, except No. MC-89913 (Sub-No. 10), were inadvertently issued; that such certificates, except No. MC-89913 (Sub-No. 2), should be canceled and at the same time new or amended certificates should be issued in conformity with the findings in the proceedings listed in part II of appendix A, except No. MC-F-619, and which require that all future operations conducted thereunder shall be subject to the limitations or restrictions as described in appendix B attached; and that the certificate issued in No. MC-89913 (Sub-No. 10) should be modified so as to require that all future operations conducted thereunder shall be subject to the limitations or restrictions as described in appendix B attached.

We further find that the certificate issued to the Frisco Transportation Company in No. MC-89913 (Sub-No. 2) requires no modification.

An appropriate order will be entered.

MITCHELL, *Commissioner,* dissenting:

In *United States* v. *Rock Island Motor Transit Co.,* 340 U. S. 419, the Supreme Court was called upon to determine whether or not the Commission had the power to further restrict a certificate where it had specifically reserved the right in that instrument and whether or not it could insert into a vendee's certificate a restriction not contained in vendor's certificate. Although those issues are different from those involved herein, the following language of the Court is appropriate to this proceeding:

But power in the Commission, before issuance of a certificate or approval of acquisition, to limit railroad motor operations so as to make them auxiliary and supplemental to rail service *does not necessarily imply power to change the conditions* designed to bring about the desired coordination, *after issuance of the certificate.* The parent railroad may have acquired or de- [fol. 689] veloped its motor affiliate in reliance on the conditions stated in the certificate. (Pages 433-434.) [Italics supplied.]

When competition, public interest in the preservation of the inherent advantages of rails and motors, and use of motor service by railroads in their operations are the basis, as they are * * * for allowing acquisitions of motor routes by railroads, we think it consonant with that policy to reserve the right to make further limitations, restrictions or modifications to insure that the service remain auxiliary or supplemental. Congress could not have expected the Commission to be able to determine once and for all the provisions essential to maintain the required balance. *Such a reservation, of course, does not provide unfettered power in the Commission to change the certificate at will.* That would violate section 212, allowing suspension, change or revocation only for the certificate holders' willful failure to comply with the Act or lawful orders or regulations of the Commission. (Pages 434-435.) [Italics supplied.]

* * * We will solve the problem by determining that the order approving the purchase has not the finality of a certificate but is rather only a tentative approach to the consummation of the purchase subject to changes in conditions and requirements. * * * This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. (Pages 445-446.)

The report of the majority bases our right to change the certificates involved herein on a finding that they were issued through inadvertence. It is interesting to note, according to the majority, that we inadvertently issued five separate and distinct certificates in five different proceedings which, although they involved the same carrier, were handled individually. If that be true, as the majority find, then some Bureau of this Commission was pretty careless in the manner in which it was handled. The record, in my opinion, does not justify the findings of the majority and, therefore, I respectfully dissent.

ALLDREDGE, *Commissioner*, dissenting in part:

I agree with the conclusions of the majority in the Sub-No. 2 and Sub-No. 10 proceedings. In each of the remaining proceedings, division 5 entered orders approving the purchase by the Frisco Transportation Company of certain operating rights subject to the terms and conditions set out in the findings in the respective reports. In the findings of each of the reports is a *reservation* to the effect that the authority granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary to, or supplementary of, the train service of the parent railway company. Thereafter, in subnumbers 1, 3, 5, and 6, of docket No. MC-89913 (respectively assigned to embrace the rights purchased in MC-F-618, MC-F-578, MC-F-678, and MC-F-679) division 5 entered orders direct-[fol. 690] ing that the Frisco Transportation Company be issued certificates upon compliance with certain conditions. Each of the last-mentioned orders was introduced by the phrase: "This proceeding coming on for further consideration." These orders specified the authority to be issued, but did not contain the reservation mentioned above; nor was the reservation placed in the certificates which were thereafter issued. A question is raised as to the power of the Commission now to put the above reservation in the certificates.

In *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, the Supreme Court, in connection with the power

of the Commission to tighten the restrictions in a certificate of a railroad's motor-carrier affiliate, stated at page 445:

> This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such procedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected.

The majority has now undertaken such a procedure on the ground that the reservation was inadvertently omitted from the certificates. Such a position, it seems to me, is tenuous. Compare *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424. This does not mean, however, that I am of the opinion that nothing can or should be done. Section 208 (a) of the Interstate Commerce Act expressly provides that there shall, at the time of issuance and *from time to time thereafter*, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may require.

I would proceed under section 208 (a) of the act to attach to the certificates the conditions which the majority has found to be proper.

COMMISSIONERS MAHAFFIE and KNUDSON dissent.

COMMISSIONER TUGGLE did not participate in the disposition of these proceedings.

APPENDIX A

Proceedings covered by report

PART I

No. MC-89913 (Sub-No. 1), Frisco Transportation Company Extension—Joplin-Miami

No. MC-89913 (Sub-No. 2), Frisco Transportation Company Extension—Hugo-Paris

[fol. 691] No. MC-89913 (Sub-No. 3), Frisco Transportation Company Extension—Joplin-Carthage

No. MC-89913 (Sub-No. 5), Frisco Transportation Company Extension—Memphis-Blytheville

No. MC-89913 (Sub-No. 6), Frisco Transportation Company Extension—Memphis-Walnut Ridge

No. MC-89913 (Sub-No. 10), Frisco Transportation Company Extension—Blytheville-Lake City

PART II

No. MC-F-578, Frisco Transportation Company—Purchase—Joseph D. Cooper. Prior Report 15 M. C. C. 317.

No. MC-F-618, Frisco Transportation Company—Purchase—John Hamm. Prior Report: 15 M. C. C. 320.

No. MC-F-619, Frisco Transportation Company—Purchase—J. A. Rose. Prior Report: 15 M. C. C. 323.

No. MC-F-678, Frisco Transportation Company—Purchase—Joseph W. Parker. Prior Report: 25 M. C. C. 96.

No. MC-F-679, Frisco Transportation Company—Purchase—Louis Tolson. Prior Report: 25 M. C. C. 96.

APPENDIX B

Limitations or restrictions which division 5 found in its report on further hearing, 53 M. C. C. 415, should be imposed in certificates issued in proceedings listed in part I of appendix A.

1. The service to be performed by the Frisco Transportation Company, hereafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, hereafter called the Railway, except that this condition shall not apply with respect to Dyess, Ark.

2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Mamphis, Tenn., and Amory-Tupelo (considered as one), Miss.

4. All contractual arrangements between the Transportation Company and the railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the railway.

[fol. 692] ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of December, A. D. 1953.

No. MC-89913 (Sub-No. 1)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

No. MC-89913 (Sub-No. 2)
FRISCO TRANSPORTATION COMPANY EXTENSION—
HUGO TO PARIS

No. MC-89913 (Sub-No. 3)
FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-CARTHAGE

No. MC-89913 (Sub-No. 5)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-BLYTHEVILLE

No. MC-89913 (Sub-No. 6)
FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-WALNUT RIDGE

No. MC-89913 (Sub-No. 10)
FRISCO TRANSPORTATION COMPANY EXTENSION—
BLYTHEVILLE-LAKE CITY

No. MC-F-578
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH D. COOPER

No. MC-F-618
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOHN HAMM

No. MC-F-619
FRISCO TRANSPORTATION COMPANY—PURCHASE—
J. A. ROSE

No. MC-F-678
FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH W. PARKER

No. MC-F-679
FRISCO TRANSPORTATION COMPANY—PURCHASE—
LOUIS TOLSON

It appearing, That on October 22, 1951, the Commission, division 5, entered its report, 53 M.C.C. 415, and order in the above-entitled proceedings, ordering that certain certificates of public convenience and necessity held by Frisco Transportation Company should be revoked because they were inadvertently issued, and that new or amended certificates should be issued in order to insure that the service rendered thereunder shall in the future be limited to that which is auxiliary to, or supplemental of, rail service;

It further appearing, That by order entered July 7, 1952, upon consideration of the records in the above-entitled proceedings, of petition filed by Frisco Transportation Company, and of the replies filed by certain parties thereto, the said proceedings were reopened for oral argument;

And it further appearing, That full investigation of the matters and things involved in these proceedings has been made; and that the Commission, on the date hereof, has made and filed a report on oral argument herein containing its findings of fact and conclusions thereon, which

report and the aforesaid report and order of October 22, 1951, are hereby referred to and made a part hereof;

[fol. 693] *It is ordered,* That the order of October 22, 1951, be, and it is hereby, vacated and set aside.

It is further ordered, That the certificates heretofore issued to the Frisco Transportation Company in No. MC-89913 (Sub-Nos. 1, 3, 5, and 6) be, and they are hereby, cancelled; and that new or amended certificates be issued in lieu of those cancelled in conformity with the findings in Nos. MC-F-578, MC-F-618, MC-F-678, and MC-F-679, and that all future operations conducted thereunder shall be subject to the limitations or restrictions set forth in appendix B attached to the said report on oral argument.

And it is further ordered, That the certificate heretofore issued to the Frisco Transportation Company in No. MC-89913 (Sub-No. 10) be modified so as to require that all future operations conducted thereunder shall be subject to the limitations or restrictions as set forth in appendix B attached to the said report on oral argument.

By the Commission.

/s/ GEORGE W. LAIRD
Secretary.

[fol. 694] PLAINTIFF'S EXHIBIT 5

TESTIMONY OF R. C. BRYANT

My name is R. C. Bryant, Springfield, Missouri. I am employed by the Frisco Transportation Company as Vice President and General Manager. Prior to that time I was employed as General Manager and Assistant General Manager. I assisted in organizing the Frisco Transportation Company in 1937, and have been in the truck transportation field for approximately 20 years. I also hold the position as Supervisor of Motor Transportation of the St. Louis-San Francisco Railway Company. With the exception of one year, I have been with the Frisco Railway or its motor subsidiary since 1917.

The Frisco Transportation Company is authorized to operate in interstate commerce under Certificate of Public

Convenience and Necessity in MC-89913, which is a consolidation of a number of certificates issued in various individual cases. It operates as a motor common carrier of general commodities over regular routes. It is a common carrier for the public handling truck freight on truck billing under truck rates, which I will refer to as "all-out truck service." It performs all functions that have been authorized and generally provides a service comparable to other motor common carriers.

The Transportation Company extensively interchanges traffic with other motor carriers, both truckload and less-truckload. In order to aid the free flow of traffic it has made extensive trailer interchange arrangements with common carriers with which it connects, including most of [fol. 695] the intervening motor carriers. Trailer interchange agreements are actively maintained with some 140 carriers. This includes interchange and through trailer arrangements with carriers at Memphis who serve the Southeast, at Kansas City with lines serving the area north and west, at Dallas with lines serving Texas, Louisiana and territory south and west, and at Tulsa and Joplin with carriers who serve Kansas, Oklahoma and Colorado.

The Transportation Company is a wholly owned subsidiary of the St. Louis-San Francisco Railway Company. In addition to performing an all-out truck service, it also performs for the parent railway substitute service, truck for rail, as authorized by the Commission in Ex Parte No. 129, 232 ICC 683. This consists of handling less than carload traffic for the railroad at rail rates on rail billing between points on the railroad which the Transportation Company is authorized to serve. In addition to this, certain terminal services, such as collection and delivery of small shipments, are performed under contract for the parent railroad.

The rolling stock consists of 131 heavy duty tractors, 235 trailers and 81 straight trucks. In addition to this, it operates under long-term lease, 12 trucks, 29 tractors, and 25 trailers. Comparable figures for 1945 are contained in Exhibit 7-A introduced at the Kansas City hearing by Witness Essex. The tractors are gasoline or diesel pow-

ered. Trailer equipment consists of 33-foot tandem axles and 35-foot "high cube" tandems. "High cube" is a trade name used to designate large modern trailer equipment. We operate approximately 15 trailers equipped with mechanical refrigerating devices and 20 units which are [fol. 696] insulated and equipped with dry ice bunkers. Book value of the rolling stock as of this date is $674,720.33.

A total of 13 exclusive Transportation Company terminals are operated. Modern truck shops are operated at six major terminals. At Springfield we operate an up-to-date trailer plant which is capable of a complete trailer construction job. During the past year this company has built 12 new trailers at this facility. In addition to the mechanical facilities, we also maintain a tire recapping plant at Springfield which take care of all recapping and repair requirements.

On the average the Transportation Company operates 103 schedules daily, some transport only truck freight, some only rail freight in substitute service for the railroad, and some both less-truckload truck freight and substitute less-carload freight for the railroad. Mixtures of rail and truck freight in the same vehicle occur only in so-called peddler schedules which originate at the major terminals into and out of which railroad merchandise cars are handled. The schedules containing both rail and truck freight constitute only a small proportion of the total. Due to the small amount of less-carload rail freight available for many of the schedules now operated, many of them would have to be discontinued if the Transportation Company is restricted to the handling of such freight and it would be no longer economical to continue daily operation in many cases. In 1955 it operated 5,589,890 [fol. 697] truck miles serving 323 towns. Its certificates authorize it to operate and it does operate approximately 3,466 miles.

In the year 1955, the Transportation Company handled 289,592,000 pounds of all-out truck freight, from which the gross revenue was $2,498,916.59. It handled 195,260,000 pounds of less than carload rail freight for the railroad on a divisional arrangement which resulted in a gross revenue of $819,989.72. The total gross revenue from all operations in 1955 was approximately $3,500,000.

As of the present time, the Transportation Company has 415 employes; its average monthly payroll is $153,200.

I have studied the Commission's order of December 7, 1953, and am familiar with the restrictions it would impose upon the Company's operations. The segment cases reopened by the Commission involve only 284 miles; however, examination of Exhibit —— will show that the Hamm-Cooper segment between Carthage, Missouri, and Miami, Oklahoma, is located in the center of the direct route between St. Louis and Kansas City on the one hand and Tulsa, Oklahoma City and Dallas, on the other. The Tolson segment is located in the center of the direct routes from Kansas City and from Springfield and points beyond in Missouri, Oklahoma and Texas, to Memphis and beyond. The imposition of these restrictions on these two segments would have the effect of cutting in two the principal operating rights of this Company and would [fol. 698] prohibit handling all-out truck freight to, from or between points actually located on the particular segments, but, far more important, would destroy all through traffic which passes over the segments coming from anywhere beyond and going to anywhere beyond.

At the present time, approximately 75% of the traffic handled by the Transportation Company is at truck rates and on truck billing, which ratio also holds true for the traffic affected by the restrictions sought to be imposed. The loss of this business would prohibit the economical operation of peddler service as now performed. The volume of rail freight would not be sufficient to justify daily service in the territory which would be affected by these restrictions. As a matter of necessity, it would result in either lighter loads or less frequent service, or both. Light loads are economically unfeasible because of present-day equipment and the high cost of labor, particularly line haul drivers. In order to carry on a profitable operation it has been necessary to make substantial purchases of 35-foot "high cube" trailers which are capable of carrying a maximum of 36,000 pounds. It would not be practical to use such equipment if we are compelled to handle light loads of peddler freight.

The economic existence of this Company is almost wholly dependent on traffic moving from, to or through the seg-

ments in question. The bulk of all-out truck traffic handled moves between St. Louis and the territory north and east of that gateway and the southwest; between Kansas City and the vast area north and west thereof and the southwest; [fol. 699] between Kansas City and the southeast through the Memphis gateway; and between the southwest and the southeast moving via Springfield.

The effect of Condition 1 as implemented by Condition 3 would be to add greatly to the cost of handling rail freight because it would necessitate frequent expensive transfer of freight between trucks and rail cars and also would prevent economical use of labor forces, particularly road drivers. We would be required to pay for eight hours where the actual service rendered would in many cases be much less because of the time required to operate the short haul operations which we would be required to use. The most economical run, from the standpoint of drivers' wages, is one that utilizes a full 10 hours' period as permitted by the Commission. Runs of this length would become almost an impossibility under these conditions.

In addition, very drastic reduction would be required in the amount of equipment and the size and character of such equipment. Compliance with these conditions would necessitate the use of single axle trailers in lieu of the present 35-foot "high cube tandem" equipment. Our present road tractors are generally heavy duty, gasoline or diesel powered, costing from $7,000 to $10,000 a unit. Such equipment would not be usable in short haul peddler service or economical to operate by reason of the fact that only small loads would be available.

Our shop facilities would be materially reduced, and in [fol. 700] many cases abandoned entirely, as the amount of equipment to be serviced would not justify the investment in equipment and overhead cost of shop operation. Further reductions would have to be made in drivers and dock personnel as well as supervisory forces. It is expected that only about 50% of the present number of employees would be needed to operate under the proposed conditions.

The disposition of tractors, trailers and shop equipment would be at a very great sacrifice and we could expect to incur a very severe financial loss. The present demand for

used automotive and shop equipment is not very great as there is a plentiful supply of new equipment which is generally preferred by those having use for such equipment. Tractors and trailers are not generally being sold for the depreciated or book value on the present day market.

In my opinion little, if any, of the traffic which plaintiff will necessarily lose as a result of the conditions will be gained by the parent company.

There will also be an adverse effect on traffic not directly affected by the conditions. If the conditions are imposed, shippers and interline connecting carriers will be discouraged in the use of our service to the extent that a very serious decline will be experienced in the traffic handled. Many shippers and connecting carriers determine that there are some restrictions in our certificate and without going to the trouble of making any further investigation give [fol. 701] the traffic to a competing motor carrier who has unrestricted authority.

[fol. 702] GOVERNMENT'S EXHIBIT 1

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

I, HAROLD D. McCOY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is true copy of Bureau of Motor Carriers, Section of Finance, memorandum dated April 26, 1939, addressed to H. M. Roberts, Chief, Section of Certificates, et al., signed JED, and attachment which memorandum, including attachment, is filed in Docket No. MC-89913 Sub-No. 5, Frisco Transportation Company Extension—Memphis-Blytheville, in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 15th day of June 1956.

/s/ HAROLD D. McCOY
SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

SEAL

[fol. 703] GOVERNMENT'S EXHIBIT 1

Form SF-46 (R) AHM:rhs

INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS
SECTION OF FINANCE

April 26, 1939

Memorandum:

To: Messrs. H. M. Roberts, Chief, Section of Certificates,

W. T. Hayes, Chief, Section of Traffic,

W. A. Hill, Chief, Section of Complaints,

H. L. Callanan, Acting Chief, Section of Insurance

From: J. Edward Davey, Chief, Section of Finance

NOTIFICATION OF PROPOSED DATE OF CONSUMMATION

You are advised of proposed date of consummation of transaction in:

I Docket No. MC-F-678 √ (Initialed RMR)

II Short Title: Frisco Transportation Company—Purchase—Joseph W. Parker

III Full corporate name and address of Applicant:
Frisco Transportation Company
906 Olive Street,
St. Louis, Missouri

IV Proposed Date of Consummation: May 1, 1939

Remarks: The letter of notification includes the following:

"Immediate steps are being taken at this time to comply with insurance and tariff provisions * * *."

Certificate and/or permit (or pending application therefor) *apparently* involved:

89913
Frisco Transportation Company MC-~~88982~~
Joseph W. Parker MC-31430, 71901

It is assumed each of you will take the appropriate action in the premises.

/s/ JED

(Rubber Stamp—Interstate Commerce Commission—Received—Apr 27 1939—Section of Certificates.)

[fol. 704] INTERSTATE COMMERCE COMMISSION

No. MC-F-678[1]

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOSEPH W. PARKER

Submitted March 28, 1939. *Decided April 12, 1939.*

Purchase by Frisco Transportation Company of operating rights and property of Joseph W. Parker, doing business as J. W. Parker Truck Line, and of certain operating rights and property of Louis Tolson, doing business as Tolson's Transfer, approved and authorized, subject to condition.

William W. Dalton for applicant.
George W. Holmes, Howard C. Smiley, and *James W. Wrape* for protestants.

REPORT OF THE COMMISSION

DIVISION 5, COMMISSIONERS EASTMAN, LEE, AND ROGERS

BY DIVISION 5:

Upon exceptions protestants contend, among other things, that "approval of these purchases under the plan of opera-

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[1] This report also embraces No. MC-F-679, Frisco Transportation Company—Purchase—Louis Tolson.

tion proposed by vendee, would be a conversion of operations from a common to a contract basis, without due process of law." Vendors are motor-vehicle common carriers, and the service proposed to be performed is similar to that which was found in *Texas & Pac. M. Transport Co. Com. Car. Applic.—Louisiana,* 10 M.C.C. 525, 528-529, to be that of common carriage, and a similar conclusion is here justified. It is also argued that if the applications are to be approved our findings should provide—

> That the vendee may only serve between the depots of the parent railroad company at those points which vendors have a right to serve on the routes proposed to be transferred and that vendee shall not serve off-route points not served with at least tri-weekly less carload service by the parent railroad.

[fol. 704-A] In our opinion, the examiner has adequately treated the foregoing matter, as well as other arguments repeated upon exceptions, and we adopt the following—

REPORT AND ORDER RECOMMENDED BY THE EXAMINER

Frisco Transportation Company, of St. Louis, Mo., by separate applications filed September 22, 1938, seeks authority under section 213, Motor Carrier Act, 1935, to purchase the operating rights and property of Joseph W. Parker, of Blytheville, Ark.,[2] doing business as J. W. Parker Truck Line, and certain operating rights and property of Louis Tolson, of Walnut Ridge, doing business as Tolson's Transfer, hereinafter referred to individually as Parker and Tolson, and collectively as vendors, for $4,000 and $3,000 respectively. The applications were referred to the examiner for hearing and recommendation of an appropriate order, and hearing has been held. Missouri Pacific Railroad Company, F. & F. Transportation Company, Bryant Truck Lines of Arkansas, Inc., Gordons Transports, Inc., and Viking Freight Company opposed the applications.

Applicant's corporate history, relationship to the St. Louis-San Francisco Railway Company (J. M. Kurn and

[2] All points mentioned are in Arkansas, unless otherwise indicated.

John G. Lonsdale, trustees), hereinafter called the rail-
[fol. 705] road, and operations in interstate or foreign commerce in Missouri, Oklahoma, and Texas, as a motor-vehicle common carrier of property, are described in *Frisco Transp. Co.—Purchase—Cooper,* 15 M.C.C. 317, *Frisco Transp. Co.—Purchase—Hamm,* 15 M.C.C. 330, and *Frisco Transp. Co.—Purchase—Rose,* 15 M.C.C. 323. Under authority granted in No. MC-88982, *Frisco Transp. Co. Common Carrier Application,* —— M.C.C. ——, and No. MC-88982 (Sub-No. 1), *Frisco Transp. Co., Seneca-Springfield Extension,* —— M.C.C. ——, on November 3, 1938, certificates were issued to applicant, covering operations in interstate or foreign commerce as a motor-vehicle common carrier of passengers, their baggage, and of express, mail, and newspapers, between Afton, Okla., and Seneca, Mo., and between Seneca and Springfield, Mo.

Applicant's balance sheet as of September 30, 1938, shows assets aggregating $101,852, consisting of: Current assets $98,920, principally cash; intangible property $1,551; deferred debits $1,269 and miscellaneous debit items $112. Liabilities were: Current liabilities $1,258, capital stock $100,000; and earned surplus $594. The latter amount represents results of intrastate passenger operations between October 4, 1937 and September 30, 1938.

No. MC-F-678.—On July 28, 1938, in No. MC-71901,[3] issuance of a certificate to Parker under the "grandfather" clause was authorized, covering operations in interstate or foreign commerce as a motor-vehicle common carrier of general commodities, with exceptions, over a regular route between Blytheville and Memphis, Tenn., approximately 75 miles, via Osceola, Wilson, and Turrell, serving all intermediate points, and the off-route points of Armorel, Dyess, Keiser, Marie, and Victoria. Under option agreement of September 1, 1938, applicant would purchase Parker's operating rights, corresponding intrastate rights, certain other intrastate rights in Arkansas, and certain physical [fol. 706] property valued at $1,425, including three motor vehicles. The purchase price is payable in cash upon ap-

[3] Substitution of Parker as applicant in lieu of United Motor Freight Lines, Inc., as to rights over this route was arranged in No. MC-FC-50, on December 16, 1936.

proval of the transaction by Federal and State regulatory bodies.

Parker formerly also claimed rights[4] as a property common carrier between Memphis and Pocahontas, using the same highway as above described for 23 miles, between Memphis and Turrell. Parker sold these rights to one Clarence M. Robertson, doing business as Robertson Truck Lines, and arrangements were made in No. MC-FC-2154, on August 18, 1937, for substitution of the latter as applicant in the pending "grandfather" application in No. MC-43394. Protestants contend, in effect, that by the transfer last mentioned Parker disposed of all his rights to operate in interstate or foreign commerce between Turrell and Memphis, (including those then claimed in No. MC-71901) and hence has no rights between those points which may be the subject of transfer to applicant herein. As previously indicated Parker was granted such rights by order entered July 28, 1938, in No. MC-71901, and questions as to the validity of that order are not properly raised in this proceeding. It should be noted certain rights between these same points over this route are also involved in the purchase from Tolson.

Parker's balance sheet as of September 13, 1938, shows assets aggregating $5,150 consisting of: Current assets $441; carrier-operating property $1,425; and intangible property $3,284. Liabilities were: Notes and accounts payable $1,150; and sole proprietorship capital $4,000. Income statements for 1937 and the period January 1, to September 13, 1938, show net income of $1,408 and $858, respectively.

No. MC-F-679.—On October 28, 1937, in No. MC-383, issuance of a certificate to Tolson under the "grandfather" clause was authorized, covering operations in interstate or foreign commerce as a motor-vehicle common carrier of general commodities, with exceptions, between Newport and Walnut Ridge, via Hoxie, serving all intermediate

[4] Substitution of Parker as applicant in lieu of J. H. and Fender H. Story, doing business as Story Transfer Company in their "grandfather" application in No. MC-43394 claiming these rights, was arranged in No. MC-FC-113, on August 14, 1936.

points; and between Hoxie and Memphis, via Jonesboro, [fol. 707] Marked Tree, and Turrell. No service to intermediate points between Hoxie and Memphis is authorized, but, by petition filed December 21, 1938, Tolson seeks authority to submit proof as to such service prior to, and since June 1, 1935, which petition is pending.

Under option agreement of August 31, 1938, applicant would purchase that portion of Tolson's operations between Walnut Ridge and Memphis, approximately 92 miles, corresponding intrastate rights, certain other intrastate rights in Arkansas, and miscellaneous equipment valued at $2,025, including two motor vehicles. The purchase price is payable in cash upon approval of the transaction by Federal and State regulatory bodies. The Arkansas commission has approved transfer of the intrastate rights of both Parker and Tolson.

Tolson's balance sheet as of August 31, 1938, shows assets aggregating $3,111, consisting of: Current assets $318; carrier-operating property $2,025; and intangible property $768. Liabilities were: Current liabilities $111; and sole proprietorship capital $3,000. Income statements for 1937 and the first eight months of 1938, show net income of $460 and $433, respectively.

General.—Considerable evidence was offered showing the manner in which coordinated rail-truck service would be rendered, similar in character to that described in *Frisco Transp. Co.—Purchase—Hamm, supra,* and many resulting benefits to the public are of record. Coordinated truck operations by applicant over vendors' routes would permit elimination of numerous lightly-loaded merchandise cars and result in a daily saving to the railroad of approximately $90. Tri-weekly local rail service between Memphis and Blytheville, and between Memphis and Hoxie, would be supplemented by twice-daily truck service. Savings of as much as 24 hours in transit time on shipments out of St. Louis, to points on vendors' routes other than Memphis and Jonesboro, would be possible. There are a number of other motor carriers operating over the routes in question. [fol. 707-A] All principal points served by vendors are stations on the railroad and others, while not directly served by the latter, are small towns not further removed

from a station thereon than 10 miles. Protestants argue that in order to protect the traffic rights of other common carriers in the territory, service by applicant should be restricted to rail points only, and in that connection refer particularly to the off-route point of Dyess, which is an off-rail point served by one of protestants. As Dyess is a small community approximately seven miles west of a station on the railroad, the invasion of territory of protestant as to that point will be inconsequential. Following No. MC-F-272, *Pacific Motor Trucking Co.—Purchase—Keithly*, 15 M.C.C. ——, and cases therein cited, a condition imposing service restrictions is not warranted here.

The examiner finds that purchase by Frisco Transportation Company of the operating rights and property of Joseph W. Parker, doing business as J. W. Parker Truck Line, and certain previously-described operating rights and property of Louis Tolson, doing business as Tolson's Transfer, including the right to a certificate covering rights confirmed in No. MC-71901 and No. MC-383, herein authorized to be transferred, with duplications eliminated, upon the terms and conditions set forth in the respective applications herein, which terms and conditions are found to be just and reasonable, will be consistent with the public interest, will promote the public interest by enabling the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, trustees) to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition; and that the conditions of section 213 have been or will be fulfilled; *provided, however, that the authority herein granted is subject to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad, and shall not unduly restrain competition.*

The appended order should be entered.

Commissioner Rogers dissents.

[fol. 708] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 12th day of April, A. D. 1939

No. MC-F-678

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOSEPH W. PARKER

No. MC-F-679

FRISCO TRANSPORTATION COMPANY—PURCHASE—LOUIS TOLSON

It appearing, That the above-entitled matters were duly referred, pursuant to section 205, Motor Carrier Act, 1935, for hearing and recommendation of an appropriate order; that upon due notice public hearing was held; that a recommended order with accompanying report was duly filed and served, which report is made a part hereof:

It is ordered, That purchase by Frisco Transportation Company, of St. Louis, Mo., of operating rights and property of Joseph W. Parker, of Blytheville, Ark., doing business as J. W. Parker Truck Line; and certain operating rights and property of Louis Tolson, of Walnut Ridge, Ark., doing business as Tolson's Transfer, be, and it is hereby, approved and authorized, subject to the terms and conditions set out in the findings in said report.

It is further ordered, That if the parties to the transactions herein authorized desire to consummate same, they shall notify this Commission of their intention so to do, in writing, prior to such consummation, and promptly take such steps as will insure compliance with the requirements of sections 215, 217, and 221 of the act, and with rules, regulations, and requirements promulgated thereunder.

It is further ordered, That recital in said report of balance-sheet and other financial data shall not be construed as approving accounting methods or expenditures represented thereby.

It is further ordered, That before recording the purchases upon its books, applicant shall submit the related journal

entries, in triplicate, to our Bureau of Motor Carriers for approval.

And it is further ordered, That nothing herein contained shall be construed as a determination of the rights of any person or persons under any section of the act, except section 213 thereof, as expressly determined herein.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

[fol. 709] GOVERNMENT'S EXHIBIT 2

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

I, HAROLD D. McCOY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is true copy of Bureau of Motor Carriers, Section of Finance, memorandum dated December 13, 1938, addressed to H. M. Roberts, Chief, Section of Certificates, et al., signed JED and attachment, which memorandum, including attachment, is filed in MC-89913 Sub-No. 1, Frisco Transportation Company Extension—Joplin-Miami, in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 15th day of June 1956.

/s/ HAROLD D. McCOY
SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

SEAL

[fol. 710] GOVERNMENT'S EXHIBIT 2

Form SF-45

INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS
SECTION OF FINANCE

December 13, 1938

Memorandum:

To: Messrs. H. M. Roberts, Chief, Section of Certificates ~~and Insurance~~,

W. T. Hayes, Chief, Section of Traffic,

W. A. Hill, Chief, Section of Complaints,

From: J. Edward Davey, Chief, Section of Finance.

NOTIFICATION OF FORMAL ACTION TAKEN

You are advised of the following action by Division 5 respecting:

I Docket No. MC-F-618

II Short Title: Frisco Transportation Company—Purchase—John Hamm

III Date of Decision: November 30, 1938

IV Nature of Decision:

(a) Dismissed

(b) Denied

(c) Granted Yes

(1) In Whole Yes

(2) In Part, as follows:

V Copy of decision is attached and should govern in preparation of certificate or permit as result of unification. Certain salient features pertaining thereto are indicated by red pencil on the copy

being transmitted to Mr. Roberts, but such phraseology should be considered in the light of the context of report and order.

Remarks:

Reference to Certificate Dockets:
Frisco Transportation Co., MC-88982
John Hamm, MC-29652
/s/ JED

(Rubber Stamp—Interstate Commerce Commission—Received—Dec 19 1938—Section of Certificates.)

[fol. 711] INTERSTATE COMMERCE COMMISSION

No. MC-F-618

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOHN HAMM

Submitted November 22, 1938. Decided November 30, 1938

Purchase by Frisco Transportation Company of operating rights and property of John Hamm, doing business as Southwest Freight Line, approved and authorized, subject to condition.

William W. Dalton for applicant.
Stanley P. Clay for protestants.

REPORT OF THE COMMISSION
DIVISION 5, COMMISSIONERS EASTMAN, LEE, AND ROGERS

BY DIVISION 5:

No exceptions were filed to the order recommended by the examiner, but it was stayed by us.

Frisco Transportation Company, of St. Louis, Mo., a wholly-owned subsidiary of St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, trustees),

hereinafter called the railway, by application filed July 7, 1938, seeks authority under section 213, Motor Carrier Act, 1935, to purchase for $3,500 operating rights and property of John Hamm, of Joplin, Mo., doing business as Southwest Freight Line. Certain motor carriers opposed the application.

Applicant was organized October 4, 1937, under the laws of Delaware pursuant to order of the United States District Court for the Eastern District of Missouri, Eastern Division, for the purpose of establishing coordinated motor-rail service between points on the lines of the railway. It is empowered by its charter, among other things, to engage in the business of a common carrier for the transportation of passengers and property by any means whatsoever. It proposes, by the instant application and pending section-207 applications, to acquire the status of a motor-vehicle common carrier of property and passengers, respectively, in interstate or foreign commerce. It also has pending two other section-213 applications[1] involving the purchase of motor-carrier properties.

[fol. 712] *Under the proposal, applicant would acquire vendor's operating rights between Miami, Okla., and Joplin,* 45 miles, together with certain physical property, including one motor truck, valued at $1,590. *On February 28, 1938, in No. MC- 29652, issuance of a certificate to vendor, under the "grandfather" clause, was authorized covering the operation described.* All points on vendor's route are also stations on the railway and are served by at least two other motor carriers.

Applicant's balance sheet as of June 30, 1938, shows total assets of $51,269, consisting of: Current assets $50,125, principally cash; intangible property $1,031; deferred debits $50; and miscellaneous debits $63. Liabilities were: Current liabilities $548; deferred credits $54; common stock $51,000;[2] and surplus (debit balance) $333.

---

[1] No. MC-F-578, Frisco Transportation Company—Purchase—Joseph D. Cooper; and No. MC-F-619, Same—Purchase—J. A. Rose.

[2] Subsequent (July 1, 1938) to date of the balance sheet 490 shares of common stock were sold to the trustees of the railway for $49,000 cash.

Vendor's balance sheet as of April 30, 1938, shows total assets of $4,176, comprised of carrier-operating property $1,590 and intangible property $2,586. Liabilities were: Current liabilities $676, principally notes payable; and sole proprietorship capital $3,500. Income statements for 1936, 1937, and first four months of 1938, show net income of $942, $1,616 and $151, respectively.

The authority herein sought is desired to afford applicant and the railway means for developing coordinated rail-truck service with a view towards retrieving some of the substantial volume of less-than-carload freight diverted from the railway to competing highway carriers, and to improve the railway's service to the public. This application and pending No. MC-F-578, which involves purchase of rights over a route between Joplin and Carthage, Mo., paralleling the railway and connecting with vendor's route at Joplin, is the first step in that direction. The proposed plan of operation will be similar to that instituted, pursuant to Commission authorization in other cases, by other rail carriers in conjunction with truck subsidiaries, and contemplates the movement of merchandise cars to set out or concentration points along the line of the railway from which distribution will be made to the smaller intermediate [fol. 713] points by truck. Thereby time in transit will be lessened, schedules of local trains presently handling the traffic will be expedited, and railroad economies inherent in coordinated service will be realized through elimination of numerous lightly-loaded merchandise cars. In the latter connection, it is estimated that the instant purchase would permit of the elimination of from 10 to 12 such cars, with a resultant monthly saving of approximately $2,500.

Protestants oppose the granting of the authority sought on the grounds: (1) That the contemplated coordinated service is a new and distinct type of operation from that being presently rendered under the operating rights involved and should not be authorized except upon a showing of public convenience and necessity under section 207; and (2) That the railway lacks corporate capacity under the Missouri constitution to engage, directly or indirectly, in motor operations. Similar contentions were advanced in *Texas & P. Motor Transport Co.—Purchase—Southern*, 5

M.C.C. 653, and for the reasons therein stated, protestants' contentions here are likewise rejected.

We find that purchase by Frisco Transportation Company of operating rights and property of John Hamm, doing business as Southwest Freight Line, including the right to a certificate issuable in No. MC-29652, covering rights herein authorized to be transferred, upon the terms and conditions set forth in the title application, which terms and conditions are found to be just and reasonable, will be consistent with the public interest, will promote the public interest by enabling the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, trustees) to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition, and that the conditions of section 213 have been or will be fulfilled: *provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said railway company, and shall not unduly restrain competition.*

An appropriate order will be entered.

COMMISSIONER ROGERS dissents.

[fol. 714] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 30th day of November, A. D. 1938

No. MC-F-618

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOHN HAMM

Hearing and investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, That purchase by Frisco Transportation Company of operating rights and property of John Hamm,

doing business as Southwest Freight Line, upon the terms and conditions set forth in the findings in said report, be, and it is hereby, approved and authorized.

It is further ordered, That if the parties desire to consummate same, they shall notify this Commission of their intention so to do, in writing, prior to the consummation thereof, and promptly take such further steps as will insure full compliance with sections 215, 217, and 221 of the act, and with rules, regulations, and requirements promulgated thereunder.

It is further ordered, That recital in the accompanying report of balance-sheet and other financial data shall not be construed as approving accounting methods or expenditures represented thereby.

It is further ordered, That before recording the purchase upon its books, applicant shall submit the related journal entries, in triplicate, to our Bureau of Motor Carriers for approval.

And it is further ordered, That nothing herein contained shall be construed as a determination of the rights of any person or persons under any section of the act, except section 213 thereof, as expressly determined herein.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(Seal)

[fol. 715] Government's Exhibit 3

Interstate Commerce Commission
Washington 25

I, Harold D. McCoy, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of Bureau of Motor Carriers, Section of Finance, memorandum dated December 13, 1938, addressed to H. M. Roberts, Chief, Section of Certificates, et al., signed JED, and attachment, which memorandum, including attachment,

is filed in Docket No. MC-89913 Sub-No. 3, Frisco Transportation Company Extension—Joplin-Cartage, in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 15th day of June 1956.

/s/ HAROLD D. McCOY
SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

SEAL

[fol. 716] GOVERNMENT'S EXHIBIT 3

Form SF-45 PCA:rm

INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS
SECTION OF FINANCE

December 13, 1938

Memorandum:

To: Messrs. H. M. Roberts, Chief, Section of Certificates ~~and Insurance~~,

W. T. Hayes, Chief, Section of Traffic,

W. A. Hill, Chief, Section of Complaints,

From: J. Edward Davey, Chief, Section of Finance.

NOTIFICATION OF FORMAL ACTION TAKEN

You are advised of the following action by Division 5 respecting:

I Docket No. MC-F-578

II Short Title: Frisco Transportation Company—Purchase—Joseph D. Cooper

III Date of Decision: November 30, 1938

IV Nature of Decision:

(a) Dismissed

(b) Denied

(c) Granted Yes

(1) In Whole Yes

(2) In Part, as follows:

V. Copy of decision is attached and should govern in preparation of certificate or permit as result of unification. Certain salient features pertaining thereto are indicated by red pencil on the copy being transmitted to Mr. Roberts, but such phraseology should be considered in the light of the context of report and order.

Remarks:

Reference to Certificate Dockets:
Frisco Transportation Co., MC-~~88982~~
Joseph D. Cooper, MC-20440
/s/ JED

(Rubber Stamp—Interstate Commerce Commission—Received—Dec 19 1938—Section of Certificates.)

[fol. 717] INTERSTATE COMMERCE COMMISSION

No. MC-F-578

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOSEPH D. COOPER

Submitted November 15, 1938. Decided November 30, 1938

Purchase by Frisco Transportation Company of operating rights and property of Joseph D. Cooper, doing business as Southwest Truck Line, approved and authorized, subject to condition.

William Dalton and *M. G. Roberts* for applicant.
Stanley P. Clay for motor-carrier protestants.

REPORT OF THE COMMISSION

DIVISION 5, COMMISSIONERS EASTMAN, LEE, AND ROGERS

BY DIVISION 5:

No exceptions were filed to the order recommended by the examiner, but it was stayed by us.

Frisco Transportation Company, of St. Louis, Mo., a wholly-owned subsidiary of St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, trustees), hereinafter called the railway, by application filed May 12, 1938, seeks authority under section 213, Motor Carrier Act, 1935, to purchase the operating rights and property of Joseph D. Cooper, of Joplin, Mo., doing business as Southwest Truck Line, for $1,200.

Certain motor-carrier protestants urge denial of the application upon the ground that the railway lacks corporate capacity under the Missouri constitution to engage, directly or indirectly, in motor operations. A similar contention was raised and rejected in *Texas & P. Motor Transport Co.—Purchase—Southern*, 5 M.C.C. 653, and for the reason therein stated protestants' contention is likewise rejected.

Applicant was organized October 4, 1937, under the laws of Delaware pursuant to order of the United States District Court for the Eastern District of Missouri, Eastern Division, for the purpose of establishing coordinated motor-rail service between points on the lines of the railway. It is [fol. 718] empowered by its charter, among other things, to engage in the business of a common carrier for the transportation of passengers and property by any means whatsoever. It proposes, by the instant application and pending section-207 applications, to acquire the status of a motor-vehicle common carrier of property and passengers, respectively, in interstate or foreign commerce. It also has pending two other section-213 applications[1] involving the purchase of motor-carrier properties.

Under the proposal, applicant would acquire vendor's operating rights between Carthage and Joplin, Mo., 18 miles, together with certain physical property, including one motor truck, valued at $625. *On March 22, 1938, in No. MC-20440,*

[1] No. MC-F-618, Frisco Transportation Company—Purchase—John Hamm; and No. MC-F-619, Same—Purchase—J. A. Rose.

issuance of a certificate to vendor, under the "grandfather" clause, was authorized covering the operation described. All points on vendor's route are also stations on the railway and are served by numerous other motor carriers.

Applicant's balance sheet as of March 31, 1938, shows total assets of $51,004, consisting of: Current assets $50,413, entirely cash; intangible property $528; and miscellaneous debits $63. Liabilities were: Accounts payable $4 and capital stock $51,000.

Vendor's balance sheet as of April 30, 1938, shows total assets of $1,338, consisting of: Current assets $128; carrier-operating property $635; and intangible property $575. Liabilities were: Accounts payable $33 and sole proprietorship capital $1,305. Income statements for 1936, 1937, and first four months of 1938 show deficit of $321, net income of $294, and deficit of $39, respectively.

The authority herein sought is desired to afford applicant and the railway means for developing coordinated rail-truck service with a view towards retrieving some of the substantial volume of less-than-carload freight diverted from the railway to competing highway carriers, and to improve the railway's service to the public. Present service [fol. 719] of the railway on such traffic between Carthage and Joplin is provided by local freight trains on a tri-weekly schedule. This fails fully to meet the demands of the shipping public so far as speed, frequency, and regularity of service are concerned. If this purchase is approved, applicant proposes to operate two round-trip daily schedules between the points considered, and to correlate such schedules with those of the fast through trains of the railway. By such handling, it is estimated that time in transit can be lessened by from 1½ to 24 hours, depending upon the origin and destination of the traffic, and that economies inherent in coordinated service can be fully realized through joint use of station facilities and resident agents of the railway at all points along the route.

We find that *purchase by Frisco Transportation Company of operating rights and property of Joseph D. Cooper, doing business as Southwest Truck Line, including the right to a certificate issuable in No. MC-20440, covering rights herein authorized to be transferred,* upon the terms and conditions

set forth in the title application, which terms and conditions are found to be just and reasonable, will be consistent with the public interest, will promote the public interest by enabling the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, trustees) to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition, and that the conditions of section 213 have been or will be fulfilled: *provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said railway company, and shall not unduly restrain competition.*

An appropriate order will be entered.

COMMISSIONER ROGERS dissents.

[fol. 720] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 30th day of November, A. D. 1938

No. MC-F-578

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOSEPH D. COOPER

Hearing and investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof;

It is ordered, That purchase by Frisco Transportation Company of operating rights and property of Joseph D. Cooper, doing business as Southwest Truck Line, be, and it is hereby, approved and authorized, subject to the terms and conditions set out in the findings in said report.

It is further ordered, That if the parties to the transaction herein authorized desire to consummate same, they shall notify this Commission of their desire to do so, in

writing, prior to consummation thereof, and promptly take such steps as will insure compliance with the requirements of sections 215, 217, and 221 of the act, and with the rules, regulations, and requirements promulgated thereunder.

It is further ordered, That recital in said report of balance-sheet and other financial data shall not be construed as approving accounting methods or expenditures represented thereby.

It is further ordered, That before recording the purchase upon its books, applicant shall submit the related journal entries, in triplicate, to our Bureau of Motor Carriers for approval.

And it is further ordered, That nothing herein contained shall be construed as a determination of the rights of any person or persons under any section of the act, except section 213 thereof, as expressly determined herein.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

[fol. 721] GOVERNMENT'S EXHIBIT 5

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

I, HAROLD D. MCCOY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of the following:

Letter dated June 8, 1938, addressed to Mr. W. P. Bartel, Secretary, Interstate Commerce Commission, Washington, D. C., and signed William W. Dalton, Counsel,

Letter dated December 17, 1938, addressed to Mr. W. P. Bartel, Secretary, Interstate Commerce Commission, Bureau of Motor Carriers, Washington, D. C., and signed W. L. English, General Manager, and

Letter of December 21, 1938, addressed to Mr. W. P. Bartel, Secretary, Interstate Commerce Commission, Washington, D. C., signed Frisco Transportation Co. by William Dalton, Attorney

the originals of which are now on file in Docket No. MC-F-578, Frisco Transportation Company Purchase—Joseph D. Cooper, in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 15th day of June 1956.

/s/ HAROLD D. McCOY
SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

SEAL

[fol. 722] GOVERNMENT'S EXHIBIT 5

Jun 10 '38 434549

FRISCO TRANSPORTATION COMPANY

(Rubber Stamp—Initialed MC—Finance Docket—Jun 27 1938—F-578.)

(Rubber Stamp—Section of Finance—File: F-578.)

(Rubber Stamp—Received—Jun 10 1938—Section of Finance.)

(Rubber Stamp—Interstate Commerce Commission—Received—Jun 10 1938—Section of Mails and Files—$.....)

906 Olive Street,
St. Louis, Missouri
June 8, 1938

MC 3370

MC-F-578—Frisco Transportation Company—Purchase motor vehicle operating rights of Joseph D. Cooper, Joplin, Missouri.

Mr. W. P. Bartel, Secretary,
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

I enclose herewith a certified copy of the order of the United States District Court for the Eastern District of Missouri, Eastern Division, in the matter of St. Louis-San Francisco Railway Company, a Missouri corporation, Debtor, wherein Geo. H. Moore, District Judge, upon petition of the Trustees, authorized the incorporation of a wholly owned subsidiary motor transport company for the purpose of establishing coordinated rail and motor service between stations on the lines of railroad belonging to the estate of the St. Louis-San Francisco Railway Company.

This is submitted under leave granted by Examiner John S. Higgins at the hearing in the above case on June 6, 1938, at Springfield, Missouri.

A true copy of this order has been served upon counsel for protestants.

Yours truly,

/s/ WILLIAM W. DALTON
Counsel

WWD:J
cc Mr. John S. Higgins,
Examiner, Interstate Commerce Commission,
Washington, D. C.

Mr. Stanley P. Clay, Atty.,
Joplin, Missouri

[fol. 723] Dec 19 '38 530770

FRISCO TRANSPORTATION COMPANY

(Rubber Stamp—Section of Finance—File: F-578.)

Springfield, Mo.
December 17, 1938.

File FTC-B-1.

MC-F-578 FRISCO TRANSPORTATION COMPANY PURCHASE JOSEPH D. COOPER.

(Handwritten Notation—Recd 12/18/38—Initials illegible.)

Mr. W. P. Bartel, Secretary,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Sir:

Referring to Order of the Interstate Commerce Commission, Division 5, dated November 30th, in the above styled case. It is the desire of the Frisco Transportation Company to consummate purchase of Joseph D. Cooper Operation under the terms prescribed in the Commission's Order, above referred to.

It is our wish to take over this operation as quickly as tariffs can be placed on file. In this connection please be referred to Agent Willette's Short Notice Application 552, December 7th, requesting authority to issue blanket supplement showing Frisco Transportation Company as a participating carrier in Bureau Tariffs.

Compliance with insurance provisions as provided in Section 215 of the Act has been made. We are preparing necessary journal entries to record the transaction and same will be placed on file as quickly as possible.

Yours very truly,

/s/ W. L. ENGLISH
General Manager.

RCB:C
c.c.
Mr. W. Y. Blanning.

Frisco Transportation Co.,
Frisco Bldg.,
Springfield, Missouri.

(Rubber Stamp—Received—Dec 19 1938—Section of Finance.)

[fol. 724]
(Rubber Stamp—Section of Finance—File: F-578.)

FRISCO TRANSPORTATION COMPANY
St. Louis, Missouri

December 21, 1938

MC F 578—Frisco Transportation Company Purchase
Joseph D. Cooper

(Handwritten Notation—All concerned—Illegible—file.)

Mr. W. P. Bartel, Secretary
Interstate Commerce Commission
Washington, D. C.

Dear Mr. Bartel:

I enclose herewith the original of a letter addressed to you by Joseph D. Cooper, the vendor, in which he indicates his desire to proceed on the above transaction under the terms prescribed by the Interstate Commerce Commission in its final order in this cause.

The Frisco Transportation Company, the applicant herein, desires to consummate this purchase on December 24, 1938.

Respectfully yours,

FRISCO TRANSPORTATION CO.

By: /s/ WILLIAM W. DALTON
William Dalton,
Attorney

(Rubber Stamp—Received—Dec 21 1938—Section of Finance.)

[fol. 725] GOVERNMENT'S EXHIBIT 6

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

I, HAROLD D. McCOY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of the following:

Letter dated December 17, 1938, addressed to Mr. W. P. Bartel, Secretary, Interstate Commerce Commission, Bureau of Motor Carriers, Washington, D. C., and signed W. L. English, General Manager, and

Letter dated December 21, 1938, addressed to Mr. W. P. Bartel, Secretary, Interstate Commerce Commission, Washington, D. C., and signed Frisco Transportation Co., by: William W. Dalton, Attorney,

the originals of which are now on file in Docket No. MC-F-618, Frisco Transportation Company, Purchase, John Hamm, in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 15th day of June 1956.

/s/ HAROLD D. McCOY
SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

SEAL

[fol. 726] GOVERNMENT'S EXHIBIT 6

Dec 19 '38 530773

FRISCO TRANSPORTATION COMPANY

(Rubber Stamp—Section of Finance—File: F-618.)

Springfield, Mo.
December 18, 1938.

File FTC-B-1.

MC-F-618—FRISCO TRANSPORTATION COMPANY PURCHASE JOHN HAMM.

(Handwritten Notation—Recd 12-18 38—Initials Illegible.)

Mr. W. P. Bartel, Secretary,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Sir:

Referring to Order of the Interstate Commerce Commission, Division 5, dated November 30th in the above styled case. It is the desire of the Frisco Transportation Company to consummate purchase of John Hamm Operation under the terms prescribed in the Commission's Order, above referred to.

It is our wish to take over this operation as quickly as tariffs can be placed on file. In this connection please be referred to Agent Willette's Short Notice Application 552, December 7th, requesting authority to issue blanket supplement showing Frisco Transportation Company as a participating carrier in Bureau Tariffs.

Compliance with insurance provisions as provided in Section 215 of the Act has been made. We are preparing necessary journal entries to record the transaction and same will be placed on file as quickly as possible.

Yours very truly,

/s/ W. L. English
General Manager.

RCB:C
c.c. Mr. W. Y. Blanning.
Frisco Transportation Co., Frisco Bldg., Springfield, Mo.

(Rubber Stamp—Received—Dec 19 1938—Section of Finance.)

[fol. 727]

(Rubber Stamp—Section of Finance—File: F-618.)

Frisco Transportation Company
St. Louis, Missouri

December 21, 1938

MC F 618—Frisco Transportation Company Purchase
John Hamm

(Handwritten Notation—All concerned—Illegible—file. A.M.)

Mr. W. P. Bartel, Secretary
Interstate Commerce Commission
Washington, D. C.

Dear Mr. Bartel:

I enclose herewith the original of a letter addressed to you by John Hamm, the vendor, in which he indicates his desire to proceed on the above transaction under the terms prescribed by the Interstate Commerce Commission in its final order in this cause.

The Frisco Transportation Company, the applicant herein, desires to consummate this purchase on December 24, 1938.

Respectfully yours,

Frisco Transportation Co.

By: /s/ William W. Dalton
William Dalton,
Attorney

[fol. 728] GOVERNMENT'S EXHIBIT 7

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

I, HAROLD D. McCOY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of the following:

Letter dated March 6, 1939, addressed to Mr. W. P. Bartel, Secretary, Interstate Commerce Commission, Bureau of Motor Carriers, Washington, D. C., and signed W. L. English, General Manager, and

Letter dated March 6, 1939, addressed to Bureau of Motor Carriers, Interstate Commerce Commission, Washington, D. C., and signed William W. Dalton, Attorney,

the originals of which are now on file in Docket No. MC-F-678, Frisco Transportation Company—Purchase—Joseph W. Parker, in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 15th day of June 1956.

/s/ HAROLD D. McCOY
SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

SEAL

[fol. 729] GOVERNMENT'S EXHIBIT 7

Mar-8 '39 569028

FRISCO TRANSPORTATION COMPANY

(Rubber Stamp—Section of Finance—File: F 678—F 679.)

Springfield, Mo.
March 6, 1939.

File FTC-B-28

MC-F-678—Frisco Transportation Co.—Purchase—Joseph W. Parker.

MC-F-679—Frisco Transportation Co.—Purchase—
Louis Tolson.

(Rubber Stamp—Interstate Commerce Commission—Received—Mar 8 1939—Section of Mails and Files.)

Mr. W. P. Bartel, Secretary,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Dear Mr. Bartel:

Referring to Order of Division 5, of the Interstate Commerce Commission, dated February 21, 1939, in the above styled cases:

The Frisco Transportation Company desires to consummate the purchase of Joseph W. Parker and Louis Tolson, under the terms prescribed in the Commission's Order.

Necessary steps are being taken at the present time to comply with insurance and tariff provisions, and journal entries recording the transaction will be submitted at an early date.

Yours very truly,

/s/ W. L. English
General Manager.

RCB:C

c.c.
Mr. W. Y. Blanning.

(Rubber Stamp—Received—Date Illegible—Section of Finance.)

[fol. 730]

FRISCO TRANSPORTATION COMPANY

Mar-8 '39 568741

(Rubber Stamp—Section of Finance—File: F 678—F 679.)

906 Olive Street,
St. Louis, Missouri
March 6, 1939

(Handwritten Notation—Illegible.)

MC-F-678—Frisco Transportation Company—Purchase—Joseph W. Parker.
MC-F-679—Frisco Transportation Company—Purchase—Louis Tolson

(Rubber Stamp—Interstate Commerce Commission—Received—Mar 8 1939—Section of Mails and Files.)

Bureau of Motor Carriers,
Interstate Commerce Commission,
Washington, D. C.

Gentlemen:

We are advised that all parties to the sales in the above proceedings desire to close the transactions on the terms set forth in the reports and orders recommended by Examiner John S. Higgins, and so far as we have been able to ascertain, there will be no objections from protestants.

We trust that formal letters from the General Manager of the Frisco Transportation Company and both vendors will be received by you within a few days.

Yours very truly,

/s/ WILLIAM W. DALTON,
Attorney.

WWD:J

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JOHN T. FEY, Clerk

No. 636

IN THE

Supreme Court of the United States

October Term, 1957

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

JURISDICTIONAL STATEMENT

GREGORY M. REBMAN
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No.

IN THE

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October Term, 1957

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

---

JURISDICTIONAL STATEMENT

Appellants, American Trucking Associations, Inc., its Regular Route Common Carrier Conference, Be-Mac Transport Company, Inc., Viking Freight Company, C.E.S. Truck Lines, Inc., L. A. Tucker Truck Lines, Inc., Consolidated Forwarding Company, Inc., and Campbell "Sixty-Six" Express, Inc., appeal from the judgment of the United States District Court for the Eastern District of Missouri, Eastern Division, entered on August 12, 1957, setting aside an order of the Interstate Commerce Commission, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 153 F. Supp. 572 (adv. sheets), and a copy is attached hereto as Appendix A. A copy of the judgment of the District Court and its findings of fact and conclusions of law is attached hereto as Appendix B. A copy of the report and order of the Interstate Commerce Commission in *Frisco Transportation Company Extension — Joplin — Miami*, 62 M.C.C. 367, set aside in large part[1] by the court below, is attached hereto as Appendix C.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on August 12, 1957, and notice of appeal was filed on October 4, 1957. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *U. S.* v. *Contract Steel Carriers, Inc.*, 350 U. S. 409; *Frozen Food Express, Inc.* v. *U. S.*, 351 U.S. 41; *M. & M. Transportation Company* v. *U. S.*, 350 U.S. 857.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding § 1, and Sections 5(2)(a) and (b) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(a) and (b), are set forth verbatim in Appendix D hereto.

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[1] The court below held that the Commission acted within its powers in issuing a restricted certificate to appellee Frisco Transportation Co. covering the Bennett operations. Accordingly, this appeal is from the court's decision with respect to the other routes involved. See footnote 2, p. 4.

QUESTIONS PRESENTED

1. Whether the District Court erred in holding that the certificates involved were not issued by the Interstate Commerce Commission as the result of a clerical error?

2. Whether the Commission could have validly issued the certificates involved without affording the motor-carrier protestants who were parties to the antecedent finance proceedings before it, notice and opportunity to protest?

3. Whether, in any event, in view of the provisions of Section 213(a)(1) of the Motor Carrier Act, 1935 (now §5(2)(b) of the Interstate Commerce Act, 49 U.S.C. §5(2)(b)), the Commission is empowered to authorize the performance of unrestricted motor-vehicle operations by railroads or their affiliates through the purchase of certificates theretofore issued to independent motor carriers?

STATEMENT

Appellee, hereinafter called Frisco, is a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company. The portions of its motor carrier operating authority involved in this appeal were all acquired by purchase of rights previously held by independent motor carriers.

Each of the reports issued by the Commission, authorizing the purchase by Frisco of the rights theretofore held by independent motor carriers, contained a finding that the rights sought were needed "to afford applicant and the railway means for developing coordinated rail-truck service," or a substantially similar finding. In addition, the authority granted was specifically made subject "to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said railway

company, and shall not unduly restrain competition."[2]

Despite this clear indication that the Commission had no intention of authorizing Frisco to engage in unrestricted motor operations, in all-out competition with independent motor carriers and, indeed, its own rail parent, the certificates ultimately issued to the rail subsidiary contained neither specific limitations upon the operating authority granted nor a reservation of the right to subsequently impose such restrictions.

Upon complaint that Frisco was engaging in unrestricted truck service, the Commission reopened for reconsideration the finance dockets in which it had approved, for coordinated rail-motor service, purchase by Frisco of the various operating authorities here involved "for the purpose of determining, what, if any, conditions or restrictions should be imposed in the certificates to remove all doubt about the character of operations" which Frisco was authorized to acquire and to perform. *Campbell Sixty-Six Exp., Inc.* v. *Frisco Transp. Co.*, 43 M.C.C. 641, 653; 46 M.C.C. 222. Although the Commission ultimately held that Frisco was not operating unlawfully, it did so upon the narrow ground that it could "look only to the certificates held by [Frisco] to determine whether it is engaging in unauthorized operations." 46 M.C.C. at 225. The Commission went on to hold, however, that its finding that Frisco was operating lawfully was not to "be taken as an indication that the certificates now held by [Frisco] may not be corrected to reflect the intent of the findings in the acquisition proceedings or that restrictions may not be imposed now in some or all of the certificates held by [Frisco] which will have the effect of limiting the service thereunder to that which is auxiliary to or supplementary of the rail service of its

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[2] *Frisco Transp. Co.—Purchase—Cooper*, 15 M.C.C. 317, *Frisco—Purchase—Hamm*, 15 M.C.C. 320, and *Frisco—Purchase—Parker*, 25 M.C.C. 96, also embracing the Tolson purchase.

parent company and preclude it from performing a direct and independent motor common carrier service." *Ibid.*

Upon reconsideration and after oral argument, the Commission concluded, as had its Examiners and Division 5, that the certificates issued to Frisco could not authorize unrestricted motor-carrier operations in view of the fact that the underlying reports, pursuant to which the certificates were issued, authorized the rail subsidiary to perform only a limited motor-vehicle service, coordinated with that of its parent railroad. The Commission further concluded that the certificates had been issued inadvertently, and that they should be cancelled; and, corrected certificates issued, so restricted as to insure that the motor operations of the rail subsidiary would be confined to service auxiliary to or supplemental of that of its rail parent. *Frisco Transp. Co. Ext.—Joplin—Miami*, 53 M.C.C. 415, 62 M.C.C. 367.

Frisco brought this action in the District Court on May 20, 1955, to set aside the Commission's report and order last referred to. The District Court, Judge Moore dissenting, found that the Commission had issued the unrestricted certificates intentionally and not as a result of clerical error, and that the Commission's order requiring cancellation of the outstanding certificates and substitution therefor of restricted certificates was without evidentiary support, and constituted an attempt, contrary to section 212 of the Interstate Commerce Act (49 U.S.C. § 312), to revoke and change a certificate duly issued.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal concern the Commission's power to correct its own clerical errors; its power to reverse its written decision, outside the record, without notice, and without affording the independent motor carrier protestants an opportunity to be heard respecting the motor authority to be issued to the rail

subsidiary here involved; and its power, in any event, to authorize a railroad or its affiliate to perform unrestricted motor operations, in all-out competition with the service provided by independent motor carriers, and indeed, that of the railroad itself. Of course, should this Court agree with appellants that the court below erred in holding that the Commission did not issue the unrestricted certificates as a result of clerical error, that would end the litigation and avoid the necessity of passing on the other two issues.

1. The majority below, in holding that the unrestricted certificates received by the rail subsidiary were not issued as the result of clerical error, relied heavily upon the decision in *Watson Bros. Transp. Co.* v. *U. S.*, 132 F. Supp. 905, affirmed, 350 U. S. 302, and the fact that the so-called compliance orders, issued subsequent to the finance proceedings here involved, but prior to the issuance of the certificates, "did not contain the limitation contained in the findings in the finance proceedings." 153 F. Supp. at 576. This fact, plus the fact that the Commission ultimately issued unrestricted certificates, despite the pendency of a complaint by independent motor carriers that Frisco was engaging in unlawful operations, persuaded the majority that the compliance orders and the certificates themselves represented a reversal of the Commission's prior determination, evidenced in its written reports referred to,[3] that the rail subsidiary was not to be allowed to perform unrestricted operations. To be blunt about it, this is nothing less than saying that the Commission, having conducted open hearings and having arrived at one conclusion, accepted both by applicant Frisco and the independent motor carrier protestants, through a subsequent "star chamber" process, in violation of both the spirit and the letter of the law which

[3] See footnote 2, p. 4

it administers, and in flagrant disregard of the most elementary rights of the independent motor carriers, reached an opposite conclusion, evidenced by the unrestricted certificates ultimately issued. We think such a conclusion is not warranted. Obviously the lower court, although not expressly so finding, must have felt that the Commission somehow conveyed to its clerical employees charged with the ministerial duty of issuing compliance orders and certificates its alleged "change of heart" respecting the authority to be issued to the rail subsidiary. Without such an intent having been conveyed, it surely could not be argued that such clerical employees have the power to reverse the orders of the Commission itself by the simple expedient of issuing compliance orders and certificates which do not contain the reservations set forth in the underlying reports of the Commission. Again, we refuse to believe that the Commission followed any such course of action. Yet only by so doing could it have expressed its alleged intent to reverse the action taken in its written reports. We prefer to believe, with the writer of the dissenting opinion below, that the issuance of the unrestricted certificates resulted from the fact that "rail-affiliated motor carrier applications for authority • • • were a distinct minority of the total number of motor carrier service authorizations sought in the 'thirties and the 'forties; no doubt those charged with the responsibility of issuing compliance orders and operating certificates found it easy to omit the proviso which was required on only a few of the motor carrier certificates with which the Section of Certificates dealt." 153 F. Supp. 578-579. In this connection, see the discussion in the report of the Commission's division 5 at 53 M.C.C. 424-425.

We submit, too, that the reliance of the majority below upon the *Watson* case as a precedent for its action here is completely misplaced. In *Watson* the Commission issued an order purporting to correct that carrier's out-

standing certificate without any prior notice to Watson or any opportunity whatsoever to be heard respecting the accuracy of the Commission's assumption that the certificate there involved had been issued in error. Here there has been an overabundance of hearings, before the Commission's Examiners, before its division 5, and finally, after oral argument, before the Commission itself. In addition, Watson, as an independent motor carrier, occupies an entirely different status than does Frisco, a rail subsidiary. The provisions of Section 5(2)(b) of the Interstate Commerce Act, requiring that railroads or their affiliates be limited to performance of motor-vehicle operations coordinated with the train service of the railroad, directly applicable to Frisco here, could not have been applied to Watson.

2. Even making the violent assumption that the Commission changed its mind, after concluding in its written finance reports that Frisco should not receive unrestricted motor authority, it is submitted that the action it allegedly took, outside the record and without affording the motor carrier protestants an opportunity to be heard, would in any event have been a complete nullity. Only Judge Moore, dissenting below, comes to grips with this aspect of the case.[4] Yet the very provisions of the law under which Frisco purchased the certificates involved herein, positively require the Commission to conduct a public hearing in all cases where carriers by railroad are involved "unless the Commission determines that a public hearing is not necessary in the public interest." 49 U.S.C. § 5(2)(b). Having complied with this mandate in conducting the hearings on the various purchase applications, it hardly seems necessary to labor the point that the

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[4] "* * * * The unrestricted compliance orders which are at variance with the finance hearings' determinations were made without any hearing at which intervenor motor carriers might have been heard." 153 F. Supp. 578.

Commission would have been obligated to take similar action[5] before reversing its previous decision limiting Frisco's operations to service auxiliary and supplemental to that of its rail parent. But the majority below, while zealously protecting the right of Frisco to receive fair and equitable treatment from the Commission, somehow seems to have completely overlooked the concurrent right of the independent motor carriers to the same guarantees of full and fair hearing. As this Court said, in *Morgan v. U. S.*, 304 U.S. 1, 18:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."

3. Assuming even further that the Commission would not have been obligated to give the independent motor carriers party to the finance proceedings, notice and opportunity to be heard before reversing its prior decision restricting Frisco to the performance of coordinated rail-motor operations, still the majority below erred in failing to hold that the provisions of § 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(b), flatly forbid the Commission to allow railroads or their affiliates to perform unrestricted motor-vehicle operations. This Court, in *U. S.* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 433, pointed out that the limitation upon operation of motor vehicles by railroads or their affiliates ". . . was in furtherance of the National Transportation Policy, for otherwise the resources of railroads might soon make over-the-road truck competition impossible . . . The control of the bulk of rail and motor transportation would be concentrated in one type of operation. Complete rail domination was not envisaged as a way to preserve the inherent advantages of each form of transportation."

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[5] Or at the very least, to have specifically found that "a public hearing is not necessary in the public interest."

Thus the language of the proviso of Section 5(2)(b), 49 U.S.C. §5(2)(b),* required the Commission, before approving the purchases sought to be made, to find, among other things, that the transaction involved would enable Frisco's parent railroad "to use service by motor vehicle to public advantage in its operations . . ." The majority of the court below, at 153 F. Supp. 578, stated:

> "What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such."

The quoted language reveals the basic misconception of the court below. The Commission, by virtue of the mandate set forth by the language of the proviso of §5(2)(b), is obliged to carry out the policy imposed by Congress—not make its own. True, it has the primary duty, subject to court review, of determining the Congressional intent behind the language used in the proviso of §5(2)(b). And while it undoubtedly has considerable latitude in interpreting the language used by Congress, it has no discretion to *ignore* it. Yet the holding of the majority below reads the language of the proviso of §5(2)(b), specifically made applicable by Congress to purchases of the type here involved, right out of the statute! We respectfully submit that the District Court is no more empowered to take such action than is the Commission itself.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the District Court be reversed and the case remanded

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* At the time of the purchases here involved, the limitations referred to were included in Section 213 of the Motor Carrier Act, 1935.

to that court for disposition consistent with this Court's opinion.

Respectfully submitted,

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1424 Sixteenth Street, N. W.
Washington 6, D. C.
Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of December, 1957, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Wayne H. Bigler, Esq., Assistant United States Attorney, U. S. Court House, St. Louis, Mo., and by mailing copies in duly addressed envelopes, with postage prepaid, to The Solicitor General and Maurice A. Fitzgerald, Esq., Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Frisco Transportation Company, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Ernest D. Grinnell, Esq., its attorney, at 300 Frisco Bldg., 906 Olive Street, St. Louis, Mo.

4. On the Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, and Order of Railway Conductors and Brakemen of America, intervening defendants, by mailing a copy in a duly addressed envelope, with postage prepaid, to James L. Highsaw, Jr., their attorney, at 620 Tower Bldg., Washington, D. C.

PETER T. BEARDSLEY

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, a corporation
Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
Defendants.

Before VAN OOSTERHOUT, Circuit Judge,

MOORE and HARPER, District Judges.

* * * *

MEMORANDUM OPINION

HARPER, Judge.

This is an action by the Frisco Transportation Company, a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission entered on December 7, 1953, which order purports to cancel certain certificates, and at the same time new or amended certificates would be issued.

This court has jurisdiction of the subject matter of this action, 28 USCA, Sec. 1326, and the case was heard by a court composed of three judges pursuant to Sections 2321-2325, 28 USCA.

At issue in this proceeding is the propriety of the cancellation and re-issue in restricted form of five operat-

ing certificates authorizing motor carrier operation by plaintiff in areas adjacent to those served by the Frisco Railroad. The Commission contends that four of these certificates issued in the year 1942 were incomplete in form in that they failed to include, due to a clerical error, a reservation of the power to restrict the operations of plaintiff by imposing limitations designed to insure that plaintiff's motor carrier service would be auxiliary and supplemental to the parent company's rail service, the necessity and propriety of such reservations of power having been determined in the finance hearings conducted when plaintiff sought to purchase truck routes from those then operating them. Plaintiff denies that such certificates were in fact issued with an inadvertent omission of the reservation of power previously determined necessary, and asserts further that, even should this be the case, the Commission is without power to correct them at this time, its power in this respect being limited by Sec. 212(a) of the Interstate Commerce Act, 49 USCA, Sec. 312(a).

With respect to the fifth certificate (Bennett), the plaintiff asserts that the Commission is without power to restrict its operation.

Under consideration in the original hearings of 1938 and 1939 and in the re-opened Commission proceedings beginning in 1945, which resulted in this action being brought, were six truck routes identified before us by the name of the vendor from whom purchase was authorized. These are the "Cooper" route from Joplin, Missouri, to Carthage, Missouri; the "Hamm" route from Joplin, Missouri, to Miami, Oklahoma; the "Tolson" route from Walnut Ridge, Arkansas, to Memphis, Tennessee; the "Parker" route from Blytheville, Arkansas, to Memphis, Tennessee; the "Rose" route from Hugo, Oklahoma, to Paris, Texas; and the "Bennett" route from Blytheville, Arkansas, to Lake City, Arkansas. In its

reconsideration of the "Rose" certificate the Commission ordered no change. The operating certificate for the "Bennett" route was issued in 1940 with the recital of a reservation of power to impose additional restrictions on the scope of activities permitted under the certificate, and hence, under the rule of *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, rehearing denied 341 U. S. 906, there can be little question of the power of the Commission to impose the restrictions which it has incorporated in the amended Bennett certificate. These restrictions are as follows:

"1. The service to be performed by the Frisco Transportation Company, hereinafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, hereinafter called the Railway, except that this condition shall not apply with respect to Dyess, Ark.

"2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

"3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Memphis, Tenn., and Amery-Tupelo (considered as one), Miss.

"4. All contractual arrangements between the Transportation Company and the Railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

"5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the railway."

Determination of the propriety of the change made in the four remaining certificates requires a somewhat more detailed examination of the administrative history of the certificates which plaintiff seeks to retain unaltered. In 1938 and 1939, finance hearings were held by an examiner for the Commission with regard to the acquisition of truck routes by plaintiff, organized in 1937, to provide co-ordinated rail-motor carrier service. After the finance hearings on these four acquisitions the examiner made his report approving acquisition by plaintiff of the routes, but in each case concluded his report with the following language:

> "* * * Provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereinafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said Railway Company and shall not unduly restrain competition."

Following the finance hearings, Division 5 of the Interstate Commerce Commission approved and adopted the report of the Hearing Examiner, with one commissioner dissenting. Following the action by Division 5 of the Commission, the plaintiff completed the purchase, and operations were commenced by the plaintiff in early 1939, and have continued without change as to the nature of or without interruption to the present time.

Thereafter, in June and July of 1939, compliance orders were issued by Division 5 of the Commission with respect to the four routes in question. The compliance orders do not contain the limitations contained in the findings in each of the finance proceedings. In 1942, certificates were issued by the Commission to the plaintiff with respect to each of the four routes, which certificates do not contain the limitations contained in the findings in each of the finance proceedings.

In July, 1941, before the issuance of the certificates under consideration, competing motor carriers filed complaints with the Commission alleging that plaintiff was operating a motor carrier service independent of parent Railway's rail service and in contravention of the condition imposed by the Commission in the finance hearings. Proceedings were had by the Commission to inquire into these complaints, and the Commission in 1946 concluded that plaintiff was not operating in violation of the terms of its certificates. The Commission indicated, however, that the ruling should not be taken as sanctioning such operation, since the proceedings pursuant to which the certificates in question were issued to the plaintiff had in fact already been re-opened for further hearing. The Commission had started these hearings in 1945, in Division 5, and Division 5 held that the operating certificates had been issued with an inadvertent omission of the proviso set out in the report of the finance hearings, and directed the cancellation and re-issue of the certificates.

Upon a petition for reconsideration presented to the full Commission, the matter was reheard by it in November, 1952. A report of the Commission issued in December, 1953, upheld the action of Division 5 in incorporating the restrictions in the operating certificates, in a divided opinion, four commissioners dissenting and one not participating. A petition for reconsideration was denied by the Commission in April, 1955, and this action was commenced a month later.

A three-judge court, in *Watson Bros. Transportation Co.* v. *U. S.*, 132 F. Supp. 905 (Affirmed 350 U. S. 927), said, l.c. 909:

> "Counsel for the Commission argues that the order of August 25, 1953, merely corrects a clerical error in the certificate of July 19, 1949. Even if the court were to assume that the Commission has authority to correct clerical errors without notice and hearing,

> the result is this case would not be different, because it is the holding of the court that the order of August 25, 1953, is more than the mere correction of a clerical error; and is an attempt made contrary to Section 212 to revoke and change a certificate duly issued."

The court in the above language clearly indicates that certificates duly issued cannot be modified in the manner sought to be modified in the case before us, even though some prior report of the Commission indicates to the contrary. This is clearly borne out by the dissenting opinion of Judge Johnsen in that case, wherein he said, l.c. 909-10:

> "The effect of the majority opinion is to hold that, where the Commission has defined the scope of public convenience and necessity existing in a particular situation, by a finding such as the statute requires, but it has in some manner issued a certificate in excess of or contrary to the limits of the public convenience and necessity so found, it can not call in the certificate or engage in any correction or reissuance thereof, in order to make the certificate conform to its finding, unless it grants the holder a hearing."

The case before us with respect to the four certificates in question is a much stronger case on the part of the plaintiff insofar as the facts are concerned than the *Watson Bros.* case. Here intervening between the issuance of the finance report and the certificates in question, was the issuance by the Commissioner of compliance orders, which did not contain the limitation contained in the findings in the finance proceedings. The action of the Commission in adopting the finance hearing report was not unanimous. Between the time that the compliance orders were issued and the four certificates were issued, a certificate was granted with respect to the Bennett route, in which the limitations were imposed. Thereafter, and before the certificates were issued by the Commission, proceedings were instituted by competing

motor carriers, complaining that the restrictions set up in the finance hearing report were applicable and that the plaintiff was operating in contravention of those conditions.

After all of these things had occurred the four certificates in question were issued. We must bear in mind that insofar as the Commission is concerned, that the words "auxiliary to" or "supplemental of" are not taken from the Act as set forth in the *Rock Island* case, supra. At pages 433-34, the court said:

> "But power in the Commission, before issuance of a certificate or approval of acquisition, to limit a railroad motor operations so as to make them auxiliary and supplemental to rail service does not necessarily imply power to change the conditions designed to bring about the desired coordination, after issuance of the certificate. The parent railroad may have acquired or developed its motor affiliate in reliance on the conditions stated in the certificate."

The Commission in *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, l.c. 472, said:

> "We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding.

As was said by the Supreme Court in the *Rock Island* case, supra, l.c. 448:

> "What slight bearing *Seatrain* has weighs on the side of the interlocutory character of the approval order. The sentence referred to reads:

> "'But, as the Commission has said as to motor carrier certificates, while the procedural "orders" antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding.'"

Under the *Watson Bros.* decision, the action of the Commission is an attempt made contrary to Section 212 to revoke and change a certificate duly issued, and is more than the mere correction of a clerical error.

While the above disposes of the case, we are further persuaded that no clerical error exists. The functions of the reviewing court are exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Rochester Telephone Co.* v. *U. S.*, 307 U. S. 125; *Mississippi Valley Barge Line* v. *U. S.*, 292 U. S. 282.

In the *Mississippi Valley Barge Line* case, supra, l.c. 286-87, the Supreme Court said:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the admiinstrative body."

The courts, however, have held in reviewing administrative orders that the orders must be supported by evidence. In *Lang Transportation Corporation* v. *U. S.*, 75 F. Supp. 915, l.c. 924, the court said:

> "Orders of the Interstate Commerce Commission which are contrary to and without adequate support in the evidence are void and have been consistently set aside by the courts." Citing *Eastern Central Motor Carriers Association* v. *U. S.*, 321 U. S. 194; *Florida* v. *U. S.*, 282 U. S. 194; *Baltimore & Ohio Railroad Company* v. *U. S.*, 264 U. S. 258, and a number of district court cases.

In the instant case the four orders last referred to are without adequate support in the evidence. The history of the case we have set forth above clearly demon-

strates that what was sought to be accomplished here, at this late date, was to restrict the operations of the plaintiff, not because a clerical error had occurred, but based upon the question of whether or not such was desired. A statement by Examiner Croft, at page 59 of the transcript of the hearing, bespeaks as much when he said during the hearing, before testimony was introduced:

> "Well, it is my assumption that if the Commission finds that restrictions are desirable, and if it concludes that it has authority to impose them at this time, they will put in restrictions similar to the so-called Kansas City Southern restrictions, including the condition 3, naming either key points or requiring an immediately prior or immediately subsequent rail haul. * * * In other words, I want information on which we can impose a workable restriction."

Where does this indicate that the restrictions will be the result of correcting a clerical error or that the hearing is about a clerical error? The report of the finance hearing examiner as to the four routes was adopted by a divided division of the Commission, with one dissent. Who would say that the Commissioner is bound by the recommendations of the hearing examiner? The books are full of cases where the recommendations of the hearing examiners have not been followed, and yet the certificates are not the result of clerical errors. The Commission is not a rubber stamp for the conclusions of hearing examiners.

Months after the approval of the finance report by a divided division, compliance orders were issued for the four routes. Thereafter, a certificate was issued for the Bennett route containing restrictions. A complaint was filed by competing carriers, complaining that the plaintiff was ignoring the restrictions of the finance hearing report, but thereafter the four certificates were issued. In the face of all this, the Commission would have us be-

lieve that the purported changes are made as the result of clerical error.

While, as set out above, under the *Watson Bros.* case we are of the opinion that the four certificates cannot be canceled as a result of the hearing conducted by the Commission since it was not conducted under Sec. 212 of the Act, yet, if we agreed with the dissenting opinion in the *Watson Bros.* case, we would still be of the opinion in this case that the four certificates in question could not be canceled and reissued because no clerical error in fact existed. We would not overrule the actions of the Commission taken at the time that the compliance orders were issued, and the certificates were issued merely because the hearing examiner at the finance hearings would have put limitations on the certificates. For us to hold that the members of the Interstate Commerce Commission are bound by the recommendation of a hearing examiner in his report, a report that was adopted by a divided division, would be to hold that the members of the Commission could not have minds of their own.

Clerical errors should be readily apparent. Such is not the case here. Four of the members of the Commission dissented and one took no part. Two of the commissioners wrote dissents setting out that in their opinion the record does not justify the finding of the majority of the Commission.

The arguments advanced here for the defense are the arguments of the minority opinion in the *Watson Bros.* case, supra. What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such.

Judgment will accordingly be for the plaintiff with respect to the "Cooper," "Hamm," "Tolson" and "Parker" routes, and the action of the Commission confirmed with

respect to the "Bennett" route. Attorneys for the plaintiff will prepare the appropriate Findings of Fact, Conclusions of Law and Judgment, and present same to the court for entry.

M. D. VAN OOSTERHOUT
U. S. Circuit Judge

U. S. District Judge

ROY W. HARPER
U. S. District Judge

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MEMORANDUM OPINION

MOORE, Judge—dissenting

Reluctantly, I must dissent from the opinion of the majority, believing as I do that the Interstate Commerce Commission acted correctly. After examining the record, I am persuaded that the omission of the proviso from the operating certificates (other than the "Bennett" certificate) was, in fact, a clerical error on the part of the Commission, and not, as plaintiff alleges, the result of an intentional decision to reverse the determination made at the finance hearings at which both plaintiff and competing carriers participated and offered evidence. The unrestricted compliance orders which are at variance with the finance hearings' determinations were made without any hearing at which intervenor motor carriers might have been heard. The intervening motor carriers and the defendant Commission did not sleep on their rights in this matter. Protests were filed with the Commission even before the operating certificates were issued. I think it is significant that rail-affiliated motor carrier applications for authority to offer motor-carrier services to the public were a distinct minority of the total number of motor carrier service authorizations sought in the

'thirties and the 'forties; no doubt those charged with the responsibility of issuing compliance orders and operating certificates found it easy to omit the proviso which was required on only a few of the motor carrier certificates with which the Section of Certificates dealt. I think it is also noteworthy that plaintiff did not file a petition for reconsideration after the conclusion of the finance hearings, as was its right under the procedural rules of the Commission. *I.C.C. General Rules of Practice. 101 (a).*

I cannot see that Transportation Company's case would be any stronger if I were in fact persuaded that the omissions from the finance orders and certificates were intentional. I do not see how plaintiff could justify changes in the Commission's findings made without giving notice, or an opportunity to be heard to those appearing at the acquisition proceedings. *49 U.S.C.A. Sec. 305(a).*

I cannot accept the view of the majority that the Watson Bros. Transportation Co. case is controlling. The basis for my view is that the "power to modify" issue which the Watson case is supposed to have settled was expressly reserved by the Supreme Court in the Rock Island case, *supra.*

> "This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such procedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected." 340 U.S. 419, 445.

The decision of the three-judge court in that case was affirmed in the Supreme Court on motion. Rule 16-1(c) of the Revised Rules of the Supreme Court provides:

> "The Court will receive a motion to affirm a judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." 1954, 346 U.S. 951, 964.

The language of this rule persuades me that the Supreme Court did not affirm the decision below on this inadvertence issue, but rather on the lack of hearing and notice. I believe the section of the Interstate Commerce Commission Act, Sec. 212(a), which plaintiff offers in support of its position, is intended to prevent the Commission from making changes in certificates when such certificates have been lawfully issued in accordance with previous findings of the Commission made after due notice and hearing. I do not think that, for example, if in these administrative proceedings the Section of Certificates had erroneously issued a certificate of authority to an intervenor motor carrier instead of to Frisco Transportation Company that such a mistake would permanently tie the hands of the Commission and thus nullify the previous findings made in the prior administrative hearings. On the issue of due process raised by the plaintiff I shall say only that I do not believe anyone can acquire an indefeasible interest in a mistake. I see no good reason in the absence of any clear legislative mandate to hold that so powerful an administrative agency as the Interstate Commerce Commission is unable to correct the clerical errors made by a subordinate entity not empowered to vary the findings and decisions of its creator.

DATED this 28th day of June, 1957.

/s/ GEO. H. MOORE
United States District Judge

APPENDIX B

In The

UNITED STATES DISTRICT COURT FOR THE EASTERN JUDICIAL DISTRICT OF MISSOURI

EASTERN DIVISION

CIVIL ACTION
NO. 10272 (1)

FRISCO TRANSPORTATION COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL,
Defendants.

JUDGMENT

This cause came on for final hearing on the complaint herein, praying for a decree enjoining and restraining the United States and its agency, the Interstate Commerce Commission, from enforcing the order of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding bearing the principal caption of MC 89913 Sub. No. 1, Frisco Transportation Company Extension—Joplin-Miami, and the chief judge of the United States Court of Appeals for the Eighth Circuit having called to the assistance of the Honorable George H. Moore, to hear and determine this cause, the Honorable Martin D. Van Oosterhout, Judge of the Court of Appeals for this Circuit, and the Honorable Roy W. Harper, Judge of the United States District Court for the Eastern District of Missouri, Eastern Division, pursuant to Section 2281 of

Title 28 of the United States Code, and said cause and the evidence therein having been heard before said three judges, it is

Ordered, adjudged and decreed that the United States of America and its agency, the Interstate Commerce Commission, be and they are hereby enjoined from enforcing the second ordering paragraph of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding bearing the principal caption MC 89913 Sub. No. 1, Frisco Transportation Company Extension—Joplin-Miami, and said second ordering paragraph is hereby forever set aside, suspended and annulled. The relief sought by plaintiff in connection with its certificate bearing No. MC-89913 (Sub No. 10) is denied, and the Interstate Commerce Commission's Order with respect thereto is affirmed.

Dated Aug. 9th, 1957.

/s/ MARTIN D. VAN OOSTERHOUT
United States Circuit Judge

/s/. ROY W. HARPER
United States District Judge

George H. Moore, United States District Judge, dissenting.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. (a). Plaintiff, Frisco Transportation Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business in the City of St. Louis, Missouri.

(b). United States of America is named a defendant pursuant to Section 2322 of the Judicial Code, 28 USCA Section 2322.

(c). The Interstate Commerce Commission intervened as a defendant in accordance with the provisions of Section 2323 of the Judicial Code, 28 USCA Section 2323.

(d). Be-Mac Transport Company, Inc.; Viking Freight Company, C.E.S. Truck Lines, Inc.; L. A. Tucker Truck Lines, Inc.; Consolidated Forwarding Company, Inc.; American Trucking Associations, Inc. and its Regular Common Carrier Conference; Railway Labor Executives Association; Brotherhood of Railroad Trainmen; Order of Railway Conductors and Brakemen of America; and Campbell "Sixty-Six" Express, Inc. were allowed to intervene as parties defendant after the filing of appropriate petitions for leave to intervene.

2. Plaintiff is a common carrier by motor vehicle engaged in the transportation of persons and property in interstate and intrastate commerce, and is a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, a common carrier by rail subject to the Interstate Commerce Act.

3. In this suit we are asked to review an order of the Interstate Commerce Commission cancelling certain operating certificates of plaintiff bearing the numbers MC 89913 Sub. No. 1 (Hamm), MC 88913 Sub. No. 3 (Cooper), MC 89913 Sub. No. 5 (Parker), MC 89913 Sub. No. 6 (Tolson), and requiring the issuance of new or amended certificates in lieu thereof. We are also asked to review the same order insofar as it modifies a certificate of plaintiff bearing number MC 89913 Sub. No. 10 (Bennett). The names in parentheses are the parties from whom plaintiff purchased the operating rights represented by these certificates. These names will sometimes be used in referring to the certificates in these findings and conclusions.

4. The proceedings before the Commission also involved plaintiff's certificate bearing number MC 89913 Sub. No. 2 (Rose), but since the Commission did not order any modification of that certificate, no action by this Court is necessary on the portion of the order dealing therewith. Therefore, the remaining findings of fact do not apply to that certificate.

5. On October 17, 1939, plaintiff filed an application to purchase a portion of the motor carrier operating rights and property of Bennett. After hearings were held, the Commission approved said purchase on March 15, 1940. A memorandum decision reporting this approval appears in 35 MCC 802. On June 13, 1940, the Commission granted plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 10, authorizing plaintiff to engage in interstate or foreign commerce as a common carrier by motor vehicle over the operating rights purchased from said Bennett, which said certificate contained the following:

> "The operations herein authorized are subject to such further limitations, restrictions, or modifications as the Commission may hereafter find it necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the St. Louis-San Francisco Railway Company, and shall not unduly restrain competition."

6. During the years 1938 and 1939, plaintiff filed applications to purchase the motor carrier operating rights and properties of Hamm, Cooper, Parker and Tolson. After finance hearings were held, Examiner's Proposed Reports were issued in connection with each of these applications, which Reports approved the purchase by plaintiff of the operating rights and properties of these motor carriers and concluded with the following language:

> "• • • Provided, however, that the authority herein granted is subject to such further limitations or

restrictions as the Commission may hereinafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said Railway Company and shall not unduly restrain competition."

7. Division 5 of the Interstate Commerce Commission approved and adopted the Reports of the hearing Examiners, with one Commissioner dissenting in each case. These Reports appear as follows: Hamm-15 MCC 320; Cooper-15 MCC 317; Parker-25 MCC 96; Tolson-25 MCC 96.

8. Following the action by Division 5 of the Commission, plaintiff completed the purchases, and operations were commenced by the plaintiff in early 1939, and have continued without change as to the nature of or without interruption to the present time.

9. On March 11, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Cooper, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued its order (commonly referred to as a "compliance order") in Docket MC 89913 Sub. No. 3, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Joseph D. Cooper, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On March 31, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 3, including inter alia the operating rights purchased from Cooper, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

10. On March 14, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Hamm, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 1, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by John Hamm, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On March 31, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 1, including inter alia the operating rights purchased from Hamm, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

11. On June 16, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Parker, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 5, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Joseph W. Parker, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On April 18, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 5, including inter alia the operating rights purchased from Parker, which certificate contained no

restriction as to the type of motor common carrier service authorized thereunder.

12. On July 10, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Tolson, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 6, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Louis Tolson, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On April 18, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 6, including inter alia the operating rights purchased from Tolson, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

13. In July 1941, prior to the issuance of the certificates of public convenience and necessity in Cooper, Parker, Hamm and Tolson, competing motor carriers filed complaints with the Commission, alleging that plaintiff was operating a motor carrier service independent of its parent railroad's rail service and in contravention of the condition imposed by the Commission in the finance hearings. After appropriate proceedings, the Commission concluded in 1946 that plaintiff was not operating in violation of the terms of its certificates (46 MCC 222). The Commission's opinion indicated that the ruling should not be taken as sanctioning such operation since the proceedings pursuant to which the Hamm, Cooper, Parker and Tolson certificates were issued to plaintiff had been reopened for further hearing.

14. The proceedings which resulted in the Commission's order of December 7, 1953, had their beginning on January 4, 1945, when the Commission entered an order reopening for reconsideration the proceedings by which plaintiff acquired the Hamm, Cooper, Parker and Tolson certificates.

15. On April 8, 1946, such reopened proceedings were heard by a hearing Examiner. During that hearing, the hearing Examiner made the following statement:

> "Well, it is my assumption that if the Commission finds that restrictions are desirable, and if it concludes that it has authority to impose them at this time, they will put in restrictions similar to the so-called Kansas City Southern restrictions, including the condition 3, naming either key points or requiring an immediately prior or immediately subsequent rail haul. * * * In other words, I want information on which we can impose a workable restriction." (59 of Transcript).

16. On May 17, 1948, a recommended report and order on further hearing was filed by Examiners William T. Croft and Beverly S. Simms.

17. After exceptions were filed, Division 5 of the Commission issued its report on further hearing on October 22, 1951. This report appears in 53 MCC 415.

18. After plaintiff filed a petition for reconsideration of the report of Division 5, the Commission reopened the proceedings for oral argument, and after such argument, the Commission modified the report of Division 5 by its report of December 7, 1953, which appears in 62 MCC 367. The order under attack was entered pursuant to this report.

19. Plaintiff's petition for reconsideration of this report and order was filed on February 2, 1954, and was denied by the Commission on April 4, 1955.

20. Plaintiff filed this suit on May 20, 1955, and on the same date a temporary restraining order was entered which enjoined the enforcement of the order of December 7, 1953, and the order of April 4, 1955.

21. The facts as to the various steps in the handling of this case beginning in 1938 and extending through the issuance of the certificates in 1942, as stated in findings of fact 6-13 inclusive herein, do not support the Commission's finding that such certificates were issued in their unrestricted form as a result of a clerical error or errors. Rather, a complete examination of the record fails to disclose any evidence that a clerical error in fact existed in the issuance of the certificates in question.

22. There was no evidence of record before the Commission which could be used as a basis for finding that a clerical error existed in the issuance of plaintiff's certificates bearing numbers MC 89913 Sub. No. 1, MC 89913 Sub. No. 3, MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6.

CONCLUSIONS OF LAW

1. This is an action to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission entered on December 7, 1953 (62 MCC 367), which order purports to cancel certain operating certificates of plaintiff and at the same time issue new or amended certificates.

2. This Court has jurisdiction of the subject matter of this action, 28 USCA Sec. 1326, and the case was heard by a Court composed of three judges pursuant to 28 USCA Sec. 2321-2325.

3. Since the Commission did not order the cancellation or modification of the certificate bearing number MC 89913 Sub. No. 2 (Rose), no action by this Court is

necessary in connection with the certificate bearing that number.

4. The Commission's action with respect to the certificate bearing number MC 89913 Sub. No. 10 (Bennett) was within its powers in view of the reservation of the power to impose additional restrictions on the scope of activities permitted under the certificate, and hence, under the rule of *United States* vs. *Rock Island Motor Transit Co.*, 340 U.S. 419, rehearing denied 341 U.S. 906, the Commission's action with regard to that certificate is affirmed and no injunction should issue as to that part of the order.

5. Plaintiff's certificates bearing the numbers MC 89913 Sub. No. 1 (Hamm); MC 89913 Sub. No. 3 (Cooper); MC 89913 Sub. No. 5 (Parker); MC 89913 Sub. No. 6 (Tolson) were duly issued.

6. The granting of a motor carrier certificate by the Commission marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. *Smith Bros. Revocation of Certificate*, 33 MCC 465, 472.

7. Motor carrier certificates duly issued cannot be modified in the manner in which plaintiff's certificates in this case were sought to be modified by the Commission, even though some prior report indicates the contrary. *Watson Brothers Transportation Company* v. *U.S.*, 135 F.S. 905 (affirmed 350 U.S. 927).

8. Section 212-(a) of the Interstate Commerce Act, 49 USCA Section 312-(a), sets forth the only basis for revocation of a motor carrier certificate as follows:

> "Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the

discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder * * *."

9. The action taken by the Commission in cancelling the Hamm, Cooper, Parker and Tolson certificates on the ground that said certificates were "inadvertently issued", is an attempt made contrary to Section 212 of the Interstate Commerce Act to revoke or change a certificate duly issued, and is more than the mere correction of a clerical error.

10. Orders of the Interstate Commerce Commission must be supported by adequate evidence. *Lang Transportation Corp.* v. *U.S.*, 75 F.S. 915, 924; *Eastern Central Motor Carriers Assn.* v. *U.S.*, 321 U.S. 194; *Baltimore & Ohio Railroad Company* v. *U.S.*, 264 U.S. 258; *Florida* v. *U. S.*, 282 U.S. 194.

11. The finding in the order of December 7, 1953, that the Hamm, Cooper, Parker and Tolson certificates were "inadvertently issued" is without adequate support in the evidence.

12. Clerical errors must be readily apparent, and the alleged clerical errors in this case are not apparent.

13. Failure by the Commission to follow Examiner's proposed report is not a sufficient showing to prove that a clerical error existed.

14. The issuance of compliance orders as found in findings of fact 9, 10, 11 and 12, and the existence of a pending complaint challenging plaintiff's right to operate over these certificates as found in finding of fact 13, together with the statement by the hearing Examiner as found in finding of fact 21, and the issuance in 1940 of a restricted certificate in connection with plaintiff's Bennett purchase, negate the existence of clerical error in the issuance of the Hamm, Cooper, Parker and Tolson certificates, and compel the conclusion that no clerical error existed in the issuance of those certificates.

15. The Commission's order of December 7, 1953, as it applies to plaintiff's certificates bearing numbers MC 89913 Sub. No. 1, MC 89913 Sub. No. 3, MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6, should be enjoined, set aside, suspended and annulled because said order is contrary to the provisions of Section 212 (a) of the Interstate Commerce Act, 49 USCA Section 312 (a).

16. In addition, because the Commission's finding that said certificates were issued as a result of clerical error is without the support of adequate evidence, the order of December 7, 1953, as it applies to the certificates described in conclusion of law 15, should be enjoined, set aside, suspended and annulled.

17. Either of the reasons stated in conclusions of law 15 or 16 would be sufficient in and of itself to require that the order be enjoined, set aside, suspended and annulled.

18. Because of our conclusion as stated in conclusion of law 15, it has not been necessary for us to consider

the additional evidence offered by plaintiff at the hearing before this Court. Our consideration has been limited to the record made before the Commission beginning with the January 4, 1945 order reopening for reconsideration the proceedings by which plaintiff acquired the Hamm, Cooper, Parker, Tolson, Rose and Bennett certificates, in accordance with the well-established principle that "* * * the validity of the order [of the Interstate Commerce Commission] must be determined upon evidence introduced before the Commission." *Louisville & Nashville Railroad Company* v. *United States,* 245 U.S. 463, 466. This principle requires that we give no consideration to matters not in the record before the Commission, but even were it proper for us to take into consideration matters such as those tendered by the Interstate Commerce Commission at the hearing before this Court, our conclusions as stated in conclusions of law 15 and 16 would not be different.

19. A permanent injunction should issue enjoining the enforcement of the provisions of the December 7, 1953, order as it applies to plaintiff's certificates bearing the numbers MC 89913 Sub. No. 1; MC 89913 Sub. No. 3; MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6.

20. No injunction should issue in connection with said order as it applies to plaintiff's certificate bearing the number MC 89913 Sub. No. 10.

/s/ MARTIN D. VAN OOSTERHOUT
United States Circuit Judge

/s/ ROY W. HARPER
United States District Judge

George H. Moore, United States
District Judge, dissenting.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. MC-89913 (SUB-No. 1)[1]

FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-MIAMI

Decided December 7, 1953

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* * * *

REPORT OF THE COMMISSION ON ORAL ARGUMENT

BY THE COMMISSION:

These proceedings involve principally the issue of whether certain certificates heretofore issued the Frisco Transportation Company, a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, hereafter called the Transportation Company and the railroad, respectively, were inadvertently issued.

In its report on further hearing, 53 M.C.C. 415, division 5 found that the certificates issued to the Transportation Company in the proceedings listed in part I of appendix A hereto, except No. MC-89913 (Sub-No. 10), were inadvertently issued; that such certificates should be revoked and at the same time new or amended certificates in conformity with the findings in the proceedings listed in part II of appendix A hereto and which require that all future operations conducted thereunder shall be subject to the limitations or restrictions set forth

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[1] This report embraces the proceedings listed in appendix A hereto.

in appendix B hereto, should be issued in lieu thereof; and that the certificate issued in No. MC-89913 (Sub-No. 10), should be modified so as to require that all future operations conducted thereunder shall be subject to the limitations or restrictions as described in appendix B.

Upon petition of the Transportation Company, to which Campbell Sixty-Six Express, Inc., an intervener in opposition, and the American Trucking Associations, Inc., and Regular Common Carrier Conference of the American Trucking Associations, Inc., interveners, replied, for good cause shown, by order entered July 7, 1952, we reopened the proceedings and the parties have been heard in oral argument. The facts are set forth in the prior report on further hearing, 53 M.C.C. 415, in considerable detail and need be restated herein only to the extent necessary for clarity of discussion and a determination of the issues presented by the petitions and at the oral argument.

The Transportation Company holds certificates authorizing motor common carrier operations over an extensive system of regular routes in Missouri, Arkansas, Tennessee, Mississippi, Kansas, Oklahoma, and Texas. More specifically, its routes extend from St. Louis, Mo., on the northeast, Memphis, Tenn., and Columbus, Miss., on the southeast, and Kansas City, Mo., on the north, to Oklahoma City, Okla., and Dallas, Tex., on the southwest. They aggregate several thousand miles, of which about 284 miles are involved in the subject proceedings. Although these authorized routes parallel generally the lines of the railroad, there are substantial segments which reach or traverse a considerable area not served by the railroad, and in a number of instances connect divergent rail lines. All of the routes, except about three, were acquired through the purchase of the operating rights of various independent motor carriers. The character of the operations authorized over the system in general will

be described briefly in order that the matters here in issue may be more fully understood. No restrictions limiting the operations to a rail auxiliary or supplementary service [2] are imposed on the routes (1) between St. Louis and Carthage, Mo., via Springfield, (2) between Kansas City and Springfield, (3) between Lebanon and Collins, Mo., which connects the two preceding routes north of Springfield, (4) between Alma, Ark., and Springfield, (5) between Dallas, Oklahoma City, and Miami, Okla., (6) between Memphis and Columbus, and (7) between Jonesboro, Ark., and Memphis. Operations over these routes are, however, in certain instances limited to service at rail stations or at points not more distant than 10 miles from rail stations of the railroad. The routes between St. Louis and Hoxie, Ark., via Cabool, Mo., partly over the route described in (1) above, and between Springfield and Cabool are subject to two restrictions. One limits the service to points within 10 miles of rail stations, and the other designates St. Louis and Memphis as key points.[3] Extending from the last-named routes are routes into Van Buren and Mountain View, Mo., operation over which is also subject to key-point restrictions at St. Louis and Memphis. The routes between St. Louis and Blytheville and certain other points in Arkansas and Missouri are subject to all of the conditions usually imposed in operations of this character, including the designation of St. Louis, Chaffee and Hayti, Mo., and Blytheville as key points and a restriction against transporting shipments

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[2] Such a restriction permits only all-motor movements in the handling of rail traffic at railroad rates and on railroad bills of lading. *See Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M. C. C. 721, 726.

[3] The key-point restriction precludes the transportation of shipments between the points designated as key points, or through, or to, or from, more than one such point.

by truck between St. Louis and points south or west of Chaffee. The usual conditions, including a rail-haul condition,[4] are also applicable on the routes between Datto and Walnut Ridge, Ark., between Lake City and Nettleton, Ark., and between Marked Tree and West Ridge, Ark.

The six certificates involved in the instant proceedings are listed in part I of appendix A. These certificates, except No. MC-89913 (Sub-No. 10), were issued pursuant to approved purchases of the operating rights of several independent motor carriers as shown in part II of appendix A. The certificate in No. MC-89913 (Sub-No. 10) was issued pursuant to the purchase approved in No. MC-F-1037 and it alone contains a specific condition subjecting the operations to such future limitations as we may find necessary to impose in order to insure that the service performed shall be auxiliary to, or supplemental of, rail service. The circumstances leading to the issuance of each of these six certificates are discussed in considerable detail in the prior report beginning at page 418 and we see no need to repeat them here. Briefly, division 5 approved the purchases by the Transportation Company of the operating rights (1) of John Hamm between Miami and Joplin, Mo., (2) of J. A. Rose from[5]

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[4] The rail-haul condition requires that the shipments transported by truck receive an immediatly prior or immediately subsequent movement by rail.

[5] Pursuant to the findings in *Frisco Transp. Co. Common Carrier Application*, 18 M. C. C. 826, a certificate, No. MC-89913, was issued the Transportation Company on March 2, 1940, authorizing it to transport general commodities, with exceptions, from Paris to Hugo, serving all intermediate points. The findings in that proceeding do not contain any restriction as to the character of service authorized, or any reservation of a right later to restrict in any manner. On March 31, 1942, a consolidated certificate was issued the Transportation Company embracing the operating authority granted pursuant to the findings in the cited proceeding and those acquired through purchase from J. A. Rose.

Hugo, Okla., to Paris, Tex., (3) of Joseph D. Cooper between Joplin and Carthage, Mo., (4) of Joseph W. Parker between Blytheville and Memphis, (5) of Louis Tolson between Walnut Ridge and Memphis, and (6) of T. N. Bennett between Lake City and Blytheville. The operating rights so purchased were later assigned Nos. MC-89913 (Sub-No. 1), MC-89913 (Sub-No. 2), MC-89913 (Sub-No. 3), MC-89913 (Sub-No. 5), MC-89913 (Sub-No. 6), and MC-89913 (Sub-No. 10), respectively.

In each of the proceedings approving the above-described purchases (see part II of appendix A), a finding was made that the purchase would be consistent with the public interest, that it would promote the public interest by enabling the railroad to use service by motor vehicle to public advantage in its operations, and that it would not unduly restrain competition. In each instance, however, the approval was made subject to a definite proviso reserving the right to impose such limitations or restrictions as the Commission might find necessary in order to insure that the service performed "shall be auxiliary or supplementary to the train service" of the railroad, and shall not unduly restrain competition. The certificate issued in each of these proceedings except in No. MC-89913 (Sub-No. 10) does not contain this limitation. The certificate in No. MC-89913 (Sub-No. 10), although it carries no restriction as to the character of the motor service authorized, does contain a specified reservation of a right in this Commission later to restrict for the purpose indicated.

Before discussing the matters raised on petition and at the oral argument, it may be well to review briefly the events which preceded the instant proceedings. In July 1941, Campbell Sixty-Six Express, Inc., and certain other motor common carriers filed a complaint alleging that the Transportation Company, with the cooperation of the railroad, was conducting certain operations as a motor

common carrier, in interstate or foreign commerce, in violation of section 206 (a) and other sections of the Interstate Commerce Act, and has willfully failed to comply with our orders, rules, and regulations governing motor common carrier operations. In *Campbell Sixty-Six Exp., Inc.*, v. *Frisco Transp. Co.*, 43 M.C.C. 641, a majority of division 5 found that certain certificates under which the Transportation Company was operating authorized the performance only of service which was strictly auxiliary or supplementary to the rail service of the railroad, and that the performance of a direct motor-carrier service to the public was unauthorized and should be discontinued. No order was entered, but the division stated that certain proceedings in which certificates were issued to the Transportation Company would be reopened for the purpose of determining what, if any, conditions or restrictions should be imposed in the certificates to remove all doubt about the character of operations which the Transportation Company was authorized to acquire and in which it is authorized to engage. Subsequently, division 5, on its own motion, reopened the proceedings covered by this report for reconsideration and thereafter they were reopened for further hearing. In our report on oral argument in *Campbell Sixty-Six Exp., Inc.*, v. *Frisco Transp. Co.*, 46 M.C.C. 222, hereafter called the *Campbell Sixty-Six* case, we disapproved the division's finding that the Transportation Company had been engaged in operations unauthorized by the certificates as then phrased, but stated (page 225):

> Nothing that we say here, however, should be taken as an indication that the certificates now held by the Transportation Company may not be corrected to reflect the intent of the findings in the acquisition proceedings or that restrictions may not be imposed now in some or all of the certificates held by the Transportation Company which will have the effect of limiting the service thereunder to that which is auxiliary to or supplementary of the rail service of its parent company and preclude it from performing a direct and independent motor common carrier service. Whether

the certificates held by the Transportation Company, which do not contain the conditions imposed in the acquisition proceedings, were inadvertently issued is not here determined. Since the prior report, a number of the proceedings pursuant to which certificates were issued to The Transportation Company have in fact been reopened for further hearing. The conditions, if any, which may and should be imposed will be considered in the reopened proceedings.

As seen, the certificate issued to the Transportation Company in No. MC-89913 (Sub-No. 10) contains a provision stating that the operations authorized are subject "to such further limitations, restrictions, or modifications" as we may find it necessary to impose, in order to insure that the service "shall be auxiliary or supplementary to the train service" of the railroad. There is now no question that we may, if we find it necessary, impose limitations or restrictions as to the service to be rendered under this certificate. See *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, hereafter called the *Rock Island* case. Whether any limitations or restrictions should be imposed will be hereinafter discussed.

The first and most important issue to be determined is whether the omission from the certificates issued to the Transportation Company in Nos. MC-89913 (Sub-No. 1), MC-89913 (Sub-No. 2), MC-89913 (Sub-No. 3), MC-89913 (Sub-No. 5), and MC-89913 (Sub-No. 6), of the condition imposed by division 5 in its findings in the finance reports, reserving the right to impose such further limitations or restrictions as we may find necessary to impose in order to insure that the service shall be auxiliary or supplementary to train service, prevents us from exercising that right without contravening the provisions of section 212 (a)[6] of the Interstate Commerce Act.

[6] Section 212 (a) provides in substance that certificates shall remain in effect until suspended or terminated as provided in the section. They may "upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or

The division found that the certificates here in issue, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase; that to the extent that the certificates issued fail to reflect the character of authority contemplated by the findings, such deficiency or deviation from the findings was inadvertent and, consequently, the certificates, departing as they do from the findings in the finance reports, were inadvertently issued; that under these circumstances the certificates may be revoked, and certificates in accord with such findings may be issued, without proceeding in accordance with the provisions of section 212 (a); and that no diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved.

In its petition, the Transportation Company renews its motion to discontinue the instant proceedings and also renews its objections to certain evidence adduced at the hearing. The motion to discontinue the proceedings is based on the ground that the Transportation Company made no request for the hearing; that the notice thereof did not inform it of the purpose of the hearing; that it has not had a full hearing; that no evidence has been adduced to show the need for the imposition of the conditions set forth in appendix B attached; and that it has been denied due process of law. Whether or not the Transportation Company requeseted the hearing is of no moment, for our power to reopen the instant proceedings is not dependent upon a request therefor by it. Some of the other contentions were discussed by the divi-

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revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, * * *." It further provides for a minimum of 30 days in which the holder may comply with a lawful order commanding obedience thereto.

sion in the prior report on page 422. We see no need to repeat them herein. Further, no arguments have been advanced by the Transportation Company which would cause us to reverse the above-mentioned rulings of the examiner and of the division. In the circumstances, they are affirmed.

The Transportation Company argues that the claimed inadvertence in the issuance of the certificates is contrary to the law and to the facts. The facts leading to the issuance of the certificates in question are relatively simple, are not disputed, were set forth in some detail in the prior report, and have been reviewed briefly herein. As heretofore stated, division 5, after formal hearings, authorized the Transportation Company to purchase the operating rights heretofore described, but in each instance, however, "the approval was made subject to a definite proviso reserving" the right to impose such limitations or restrictions as we might find necessary in order to insure that the service performed "shall be auxiliary or supplementary to the train service" of the railroad. Except with respect to the certificate issued in No. MC-89913 (Sub-No. 10), none of the certificates contain such a limitation. The Transportation Company points out, and correctly so, that in each of the proceedings included herein except in No. MC-89913 (Sub-No. 10), a so-called compliance order was issued by division 5 in each such proceeding shortly after the authorized purchase had been consummated. Thus, so-called compliance orders were issued in March 1939, in No. MC-89913, subnumbers 1, 2, and 3, in June 1939, in No. MC-89913 (Sub-No. 5), and in July 1939, in No. MC-89913 (Sub-No. 6). These compliance orders do not contain the above-described limitation, hereafter called the limitation, which was contained in the findings in each of the finance proceedings. The Transportation Company argues in effect that the certificates issued were based on the compliance

orders and therefore that they were not inadvertently issued, citing in support thereof, *Hudson Bus Transp. Co., Inc., Common Carrier Application*, 46 M.C.C. 9.

In the cited case, certain carriers petitioned for the revocation of Hudson's certificate on the ground that it inadvertently omitted a seasonal restriction and failed to specify certain streets over which the operation was to be conducted. Division 5, following the principle of the findings in *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, 42 M.C.C. 211, held that a certificate which has been issued and allowed to become final and effective without objection by interested parties, is conclusive against protestants in the absence of fraud, misrepresentation, or inadvertence on the part of the Commission, in other words that there has to be an end to litigation. The division found that the fact "that Hudson was found entitled to a somewhat different and larger operating authority than that originally requested by its predecessors does not constitute error, for our power to grant authority in excess of that requested by them is clear." In effect, therefore, the division found, which is not the case here, that the certificate described the exact operations it had intended to authorize. There was no fraud or misrepresentation, and no inadvertence in the issuance of the certificate to Hudson. Pertinent in this connection is the following comment in respect of the correction of errors from the Supreme Court's decision in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424:

> We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct. * * * Thus, it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the *Foss case*. * * *

Acceptance by the Court of our power to revise a certificate which was inadvertently issued is clearly implied

in this language. As seen, however, it held only that our action there did not involve the mere correction of a clerical error, but represented an effort to invoke a newly conceived policy.

As pointed out by the Transportation Company, none of the compliance orders issued in No. MC-89913, sub-numbers 1, 2, 3, 5, and 6, hereafter collectively called the five proceedings, contained the limitation. The limitation, however, was specifically included in the findings in each of the finance proceedings wherein the division authorized the Transportation Company to purchase certain motor-carrier rights. Thus the error, if it be an error, occurred first in the compliance orders. The certificates issued in each of the five proceedings merely followed the compliance orders and do not include the limitation.

Admittedly, in each of the finance proceedings the Transportation Company disclosed a desire, if permitted to do so, to continue all-motor service independently of the railroad, but in each proceeding it built its case primarily on the railroad's need for an auxiliary motor service, which would enable the railroad to improve its less-than-carload rail freight service, and upon the public benefits to be derived from a coordinated motor-rail service. In each case, division 5 disapproved the proposed independent all-motor operations and approved the proposed acquisitions only to enable the Transportation Company to perform service auxiliary to, or supplemental of, the rail service of the railroad, as is abundantly shown by the discussion in each report. As heretofore stated, approval of the purchase in each instance was made subject to the limitation. There is now no question that approval of motor-carrier operating rights by a railroad purchaser may be conditioned on the said purchaser's "willingness to accept a narrower certificate than that possessed by the seller." See the *Rock Island* case, *supra*. In none of the finance proceedings authoriz-

ing the purchases here in issue did the Transportation Company object to the conditions upon which the purchases were approved and, as seen, it consummated the transactions shortly after the approval in each instance.

May the findings of each of the finance proceedings specifically authorizing the approval of the purchase subject to the limitation be changed so as to eliminate any condition contained in the findings, except through a formal supplemental report, report on reconsideration, or a modifying order in the specific proceeding authorizing the said purchase? We think not. It would neither be fair nor equitable to the parties to the proceeding or to the general public to permit any such change other than in the manner specified. There has not been any type of report or order modifying the findings in any of the finance proceedings listed in part II of appendix A. The compliance order issued in each of the five proceedings sets forth the operating rights which the Transportation Company had been authorized to purchase, and in each instance omitted the limitation. In other words, each of the compliance orders and of necessity the certificates based thereon authorized operations greater than those for the performance of which the division authorized the purchase.

We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. Under these circumstances the certificates may be revoked, and certificates in accord with such findings issued, without proceeding in accordance

with the provisions of section 212 (a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved.

We might properly revoke or amend the certificates, except that issued in the No. MC-89913 (Sub-No. 10), and issue new or amended certificates containing a specific recital of the reserved right to impose further limitations or restrictions to insure that future service of the Transportation Company over the routes here involved shall be limited to service which is auxiliary or supplementary to the rail service of the railroad, and then, after issuance of such new or amended certificates, consider the further question whether the reserved right should be exercised, and, if we should find that it should be exercised, thereafter issue amended certificates containing such further limitations or restrictions. Such a course, would, however, be unnecessarily cumbersome considering the fact that a full and fair hearing already has been held for the purpose of determining what, if any, limitations or restrictions should be imposed. In view of this we shall proceed now, as did the examiner and the division, to the broader question as to whether we should exercise the reserved right and impose limitations or restrictions. We have usually imposed five conditions in certificates authorizing auxiliary or supplementary service, and these will now be discussed separately in the light of the evidence of record.

CONDITION 1

This condition, if imposed, would in general terms limit the character of service which the Transportation Company may perform to that which is "auxiliary to, or supplemental of," the rail service of the railroad. These terms were defined in *Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M. C. C. 721, and approved in the *Rock Island* case and others. Further explanation here is unnecessary. The Transportation Company vigor-

ously opposed this condition, contending that in reliance upon its unrestricted certificates and upon certain correspondence with our Bureau of Motor Carriers relative to the filing of tariffs which indicated that its status was to be that of an ordinary motor carrier, it greatly expanded its operations in the years following its acquisitions; and that to restrict them now to a service solely auxiliary or supplementary to train service would destroy its investment, and in effect constitute the taking of its property without the process of law.

At the time of the hearing, the Transportation Company's assets had increased from $109,540 to $1,083,871, and its capital stock investment from $100,000 to $450,000. Its employees increased from 4 to 763, its trucks and tractors from 4 to 318, and its trailers from 4 to 458. Its all-motor tonnage has increased from 11,585 tons to 117,521 tons, and its joint rail-motor tonnage from 10,438 to 158,212 tons. The foregoing are, however, system figures which cover operations very much more extensive than those over the comparatively short route segments here involved. Based upon a traffic and revenue study over a 7-day period in February 1946, the Transportation Company estimates that it handles 8,868,080 pounds of traffic yearly in all-motor service over the particular route segments here involved, and that the loss thereof would represent a loss of over $73,100 in revenue. This admittedly, however, presupposes a total loss of such traffic.

We do not believe that the record justifies a conclusion that there will be a total loss of the above-described traffic. It may be that some of the tonnage will be diverted to the railroad and handled by the Transportation Company. Nor does the record justify a conclusion that imposing condition 1 in the certificates as set forth in our findings herein would destroy the Transportation Company's investment. As stated, the Transportation Company holds certificates authorizing operations over

several thousand miles of routes, of which about 284 miles are involved in the instant proceedings. That the imposition of condition 1 in the certificates named in the findings herein will have some effect on the Transportation Company's investment is obvious. That the Transportation Company could not have been unaware that there was some question concerning the type of operation it could render under the rights which it was authorized to purchase in the finance proceedings listed in part II of appendix A is, we believe, also obvious. First, the findings in each of the finance proceedings in question specifically authorized the approval of the purchases subject to the limitation. Later, the type of operations conducted by the Transportation Company were the subject of a complaint in the *Campbell Sixty-Six* case heretofore discussed. In the circumstances, the Transportation Company at the very least was put on notice that there were questions concerning the type of operations which it could perform and it cannot now successfully claim any equities because of its having made investments without first taking appropriate steps to remove the doubts which existed. Concerning the imposition of condition 1 and the other conditions generally set forth in appendix B attached, the Supreme Court in the *Rock Island* case stated:

> The Commission has continually evidenced * * * by opinion and certification its intention to have rail-owned motor carriers serve in auxiliary and supplemental capacity to the railroads.
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> * * * *
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> Such restrictions hamper railroad companies in the use of their physical facilities—stations, terminals, warehouses—their personnel and their capital in the development of their transportation enterprises to encompass all or as much of motor transportation as the roads may desire. The announced transportation policy of Congress did not permit such development. [Footnote omitted.] We hold the new conditions are within the limits covered by the reservation of power to impose such further limitations as might be found necessary "to insure that the service shall be auxiliary or supplementary to the train service" of The Chicago, Rock Island and Pacific Railway Company.

We conclude that appropriate conditions should be imposed in the certificates held by the Transportation Company so as to return the operations to their proper and intended sphere, namely, a service auxiliary or supplementary to rail service. To that end, condition I will be added to the certificates here involved, with the exception discussed immediately below and with the exception of the certificate in No. MC-89913 (Sub-No. 2). The latter certificate, as seen, involves only an operation from Hugo to Paris, a distance of some 26 miles, and is physically isolated from the other routes. The Transportation Company's certificate in No. MC-89913 covers the operation in the reverse direction, namely, from Paris to Hugo, and authorizes service to and from all intermediate points. The certificate in No. MC-89913 contains no limitations or restrictions of any kind nor does it contain any reserved right to restrict. In the circumstances, the certificate issued in No. MC-89913 (Sub-No. 2) will not be revoked and the further discussion herein does not of course apply to such certificate.

CONDITION 2

This condition would limit the authorized service to points that are stations on the rail lines of the railroad, and is calculated, together with condition 3, to implement and furthert he intent of condition 1. The only point on the routes embraced herein that is not a station on the rail lines is Dyess, Ark., a small community located 7 miles from the nearest station. The division found that condition 2 should be imposed on the involved operations except that neither condition 2 nor 1 should apply to operations to or from Dyess for the reasons stated in *Texas & Pac. Motor Transport Co. Ext.—Point Blue, La.*, 47 M. C. C. 425.

The Transportation Company points out that to serve Dyess as an "independent motor carrier" means that that

town would necessarily appear in many motor-carrier tariffs to which it is a party and that it would entail considerable expense. The Transportation Company contends that it is impractical and uneconomical to "hold out" to perform one kind of service at a small town like Dyess and another and restricted service at other contiguous points. If the Transportation Company does not desire to continue serving Dyess, it may of course request permission to abandon and discontinue such service and for cancellation of its authority in this respect. Permission has been granted in those instances where it is shown that the public interest would not be injuriously affected by the abandonment. See *Frisco Transp. Co. Extension—Lake City, Ark.*, 42 M. C. C. 677.

CONDITION 3

As stated above, this condition supplements and implements condition 1. The division found that a key-point restriction should be imposed. The division further found that to be effective the latter restriction necessarily requires the naming of a number of points as key points which are not located on the particular routes here in issue but which are on connecting routes; and that the naming of such points will not operate as a limitation or diminution of the authorized operations over the latter routes, citing *Rock Island Motor Transit Co. Extension—Trenton, Mo.*, 43 M. C. C. 470. It named the key points listed in condition 3 of appendix B.

In its petition, the Transportation Company in particular objects to the naming of any key points not located on the routes here in issue. It asserts that the key points named by the division would prohibit it from transporting freight at motor rates and on motor billing (1) between St. Louis or Kansas City and Oklahoma City or Dallas by utilizing the routes authorized in Nos. MC-89913 (Sub-No. 1) and MC-89913 (Sub-No. 3), and (2)

between Kansas City or Springfield and Memphis by utilizing the routes authorized in Nos. MC-89913 (Sub. No. 5) and MC-89913 (Sub-No. 6). It argues that its right to serve between St. Louis or Kansas City and Oklahoma City or Dallas or between Kansas City or Springfield and Memphis, did not arise under any of the certificates here in issue, but that such right was authorized in *Frisco Transp. Co.—Purchase—Reddish*, 35 M. C. C. 132, *Frisco Transp. Co.—Purchase—Ozark Truck Lines, Inc.*, 35 M. C. C. 255, and others, wherein it was authorized to purchase certain operating rights which were "authorized to be unified with rights otherwise confirmed in applicant [the Transportation Company]."

The above argument is without merit. The Joplin-Miami route is one of the routes embraced in the instant proceedings and constitutes, for example, a connecting segment between the Transportation Company's routes east of Joplin into Springfield, Kansas City, St. Louis, and Memphis, and those west of Miami into Oklahoma City and Dallas. In other words, the Joplin-Miami route must be used to enable the Transportation Company to perform an all-motor service over the extremely long routes between St. Louis, Memphis, and Kansas City, on the one hand, and Dallas and Oklahoma City on the other. For the reasons heretofore discussed, we concluded that the certificate, No. MC-89913 (Sub-No. 1), covering the Joplin-Miami route, was inadvertently issued, in that it did not contain a specific recital of the reserved right to impose further limitations or restrictions to insure that future service of the Transportation Company over this route shall be limited to service which is auxiliary or supplementary to the rail service of the railroad. The naming of key points is necessary to insure that the future service over the routes shown in the findings herein will be truly auxiliary or supplementary to rail service. The key points named herein will not affect any

of the Transportation Company's operations "that do not involve also a movement over the routes which are the subject of the instant proceedings."

For the reasons discussed at some length by the division in its report beginning at page 341, it concluded that the key points listed in appendix B attached should be named. With the exception noted above, neither the Transportation Company nor any other party has raised any specific questions concerning the key points named by the division. In the circumstances, we conclude that the findings of the division respecting the named key points should be affirmed.

Conditions 4 and 5

Condition 4 provides that all contractual arrangements between the Transportation Company and the railroad shall be reported to us and be subject to revision as found necessary in order that the arrangements shall be fair and equitable to the parties. In matters relating to compensation between the two companies, the railroad will in reality be dealing with itself and, so far as ultimate financial results to it are concerned, it is immaterial what these arrangements may be. It is important, however, that they be properly adjusted if this Commission and the general public are to know or have the means of ascertaining the cost to the railroad of the services performed by the Transportation Company. Such information might be important in a rate proceeding or otherwise. See *Kansas City S. Transport Co., Inc., Com. Car. Application*, 10 M. C. C. 221. Accordingly, this condition should be imposed.

Condition 5, which will also be imposed, reserves to us the right in the future to make such further changes or modifications in the conditions as may be necessary in order to make certain that the motor service remains auxiliary or supplementary to the rail service.

FINDINGS

Upon oral argument:

We find that the certificates issued to the Frisco Transportation Company in the proceedings listed in part I of appendix A hereto, except No. MC-89913 (Sub-No. 10), were inadvertently issued; that such certificates, except No. MC-89913 (Sub-No. 2), should be canceled and at the same time new or amended certificates should be issued in conformity with the findings in the proceedings listed in part II of appendix A, except No. MC-F-619, and which require that all future operations conducted thereunder shall be subject to the limitations or restrictions as described in appendix B attached; and that the certificate issued in No. MC-89913 (Sub-No. 10) should be modified so as to require that all future operations conducted thereunder shall be subject to the limitations or restrictions as described in appendix B attached.

We further find that the certificate issued to the Frisco Transportation Company in No. MC-89913 (Sub-No. 2) requires no modification.

An appropriate order will be entered.

MITCHELL, *Commissioner*, dissenting:

In *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, the Supreme Court was called upon to determine whether or not the Commission had the power to further restrict a certificate where it had specifically reserved the right in that instrument and whether or not it could insert into a vendee's certificate a restriction not contained in vendor's certificate. Although those issues are different from those involved herein, the following language of the Court is appropriate to this proceeding:

> But power in the Commission, before issuance of a certificate or approval of acquisition, to limit railroad motor operations so as to make them auxiliary and supplemental to rail service *does*

not necessarily imply power to change the conditions designed to bring about the desired coordination, *after issuance of the certificate.* The parent railroad may have acquired or developed its motor affiliate in reliance on the conditions stated in the certificate. (Pages 433-434.) [Italics supplied.]

When competition, public interest in the preservation of the inherent advantages of rails and motors, and use of motor service by railroads in their operations are the basis, as they are * * * for allowing acquisitions of motor routes by railroads, we think it consonant with that policy to reserve the right to make further limitations, restrictions or modifications to insure that the service remain auxiliary or supplemental. Congress could not have expected the Commission to be able to determine once and for all the provisions essential to maintain the required balance. *Such a reservation, of course, does not provide unfettered power in the Commission to change the certificate at will.* That would violate section 212, allowing suspension, change or revocation only for the certificate holders' willful failure to comply with the Act or lawful orders or regulations of the Commission. (Pages 434-435.) [Italics supplied.]

* * * We will solve the problem by determining that the order approving the purchase has not the finality of a certificate but is rather only a tentative approach to the consummation of the purchase subject to changes in conditions and requirements. * * * This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. (Pages 445-446.)

The report of the majority bases our right to change the certificates involved herein on a finding that they were issued through inadvertence. It is interesting to note, according to the majority, that we inadvertently issued five separate and distinct certificates in five different proceedings which, although they involved the same carrier, were handled individually. If that be true, as the majority find, then some Bureau of this Commission was pretty careless in the manner in which it was handled. The record, in my opinion, does not justify the findings of the majority and, therefore, I respectfully dissent.

ALLDREDGE, *Commissioner*, dissenting in part:

I agree with the conclusions of the majority in the Sub-No. 2 and Sub-No. 10 proceedings. In each of the remaining proceedings, division 5 entered orders approving the purchase by the Frisco Transportation Company of certain operating rights subject to the terms and conditions set out in the findings in the respective reports. In the findings of each of the reports is a *reservation* to the effect that the authority granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary to, or supplementary of, the train service of the parent railway company. Thereafter, in subnumbers 1, 3, 5, and 6, of docket No. MC-89913 (respectively assigned to embrace the rights purchased in MC-F-618, MC-F-578, MC-F-678, and MC-F-679) division 5 entered orders directing that the Frisco Transportation Company be issued certificates upon compliance with certain conditions. Each of the last-mentioned orders was introduced by the phrase: "This proceeding coming on for further consideration." These orders specified the authority to be issued, but did not contain the reservation mentioned above; nor was the reservation placed in the certificates which were thereafter issued. A question is raised as to the power of the Commission now to put the above reservation in the certificates.

In *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, the Supreme Court, in connection with the power of the Commission to tighten the restrictions in a certificate of a railroad's motor-carrier affiliate, stated at page 445:

> This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or

the certificate itself. If any such procedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected.

The majority has now undertaken such a procedure on the ground that the reservation was inadvertently omitted from the certificates. Such a position, it seems to me, is tenuous. Compare *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424. This does not mean, however, that I am of the opinion that nothing can or should be done. Section 208 (a) of the Interstate Commerce Act expressly provides that there shall, at the time of issuance and *from time to time thereafter*, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may require.

I would proceed under section 208 (a) of the act to attach to the certificates the conditions which the majority has found to be proper.

COMMISSIONERS MAHAFFIE and KNUDSON dissent.

COMMISSIONER TUGGLE did not participate in the disposition of these proceedings.

APPENDIX A

Proceedings covered by report

PART I

No. MC–89913 (Sub.-No. 1), Frisco Transportation Company Extension—Joplin-Miami

No. MC–89913 (Sub-No. 2), Frisco Transportation Company Extension—Hugo-Paris

No. MC–89913 (Sub-No. 3), Frisco Transportation Company Extension—Joplin-Carthage

No. MC–89913 (Sub-No. 5), Frisco Transportation Company Extension—Memphis-Blytheville

No. MC–89913 (Sub-No. 6), Frisco Transportation Company Extension—Memphis-Walnut Ridge

No. MC–89913 (Sub-No. 10), Frisco Transportation Company Extension—Blytheville-Lake City

PART II

No. MC–F–578, Frisco Transportation Company—Purchase—Joseph D. Cooper. Prior Report: 15 M. C. C. 317.

No. MC–F–618, Frisco Transportation Company—Purchase—John Hamm. Prior Report: 15 M. C. C. 320.

No. MC–F–619, Frisco Transportation Company—Purchase—J. A. Rose. Prior Report: 15 M. C. C. 323.

No. MC–F–678, Frisco Transportation Company—Purchase—Joseph W. Parker. Prior Report: 25 M. C. C. 96.

No. MC–F–679, Frisco Transportation Company—Purchase—Louis Tolson. Prior Report: 25 M. C. C. 96.

APPENDIX B

Limitations or restrictions which division 5 found in its report on further hearing, 53 M. C. C. 415, should be imposed in certificates issued in proceedings listed in part I of appendix A.

1. The service to be performed by the Frisco Transportation Company, hereafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, hereafter called the Railway, except that this condition shall not apply with respect to Dyess, Ark.

2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Memphis, Tenn., and Amory-Tupelo (considered as one), Miss.

4. All contractual arrangement between the Transportation Company and the railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the railway.

APPENDIX D

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

• • • •

COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

Sec. 5. [*As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, June 19, 1934, August 9, 1935, September 18, 1940 and August 2, 1949.*] [*49 U. S. C. § 5.*]

• • • •

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that,

subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

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No. 636 15

IN THE

Supreme Court of the United States

October Term, 1958

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Appellants,*

v.

FRISCO TRANSPORTATION COMPANY, *Appellees.*

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

APELLANTS' REPLY BRIEF

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APELLANTS' REPLY BRIEF

Preliminary

These appellants filed their jurisdictional statement herein on December 3, 1957, before this Court's decision in *American Trucking Associations, Inc., et al.* v. *U. S. et al.*, — U.S. —, 78 S. Ct. 165. This reply brief is filed primarily because we believe that decision eliminates any need for determining one of the questions posed here, i. e., whether or not the unrestricted certificate received by appellee, a railroad subsidiary, was inadvertently issued by the Commission. Although that decision dealt with an application filed under §207 of the Interstate Commerce Act, 49 U.S.C. §307, we submit that the Court's opinion leaves no room for doubt that in a §5 case such as this the Commission lacks statutory power to authorize a railroad or its affiliate to perform unrestricted motor

operations. If we are correct, it follows that the unrestricted certificates here involved are a nullity, whether issued through inadvertence or otherwise, and must be restricted to conform to the requirements of the statute.

The Commission is Without Power to Issue Unrestricted Certificates Under §5(2)(b)

In our jurisdictional statement, filed December 3, 1957, we stated that the provisions of §5(2)(b) of the Interstate Commerce Act, 49 U.S.C. §5(2)(b), "flatly forbid the Commission to allow railroads or their affiliates to perform unrestricted motor vehicle operations." (page 9)

Appellee, in its motion to affirm, notes this contention, and points out (page 17) that "the Interstate Commerce Commission does not share the opinion of the appellants that Section 5(2)(b) of the Interstate Commerce Act must be so construed." Appellee also notes (p. 16) that what it terms a similar contention in connection with a §207 application "was recently rejected by this Court in *American Trucking Associations, Inc.* v. *United States of America*, Nos. 6 and 8, October Term, 1957, decided December 9, 1957." There is no further discussion of the cited case in appellee's brief. We think this Court's opinion therein clearly stands for the proposition that while the Commission may occasionally depart from the auxiliary and supplementary limitations of §5(2)(b) in a §207 proceeding, the corollary is that in a §5 case such as this the statutory language specifically applicable clearly deprives the Commission of the power to authorize unrestricted railroad truck service. The very language of the Court's opinion in the case referred to bears this out. The reference at — U. S. —, 78 S.Ct. 171, to the language of the proviso of §5(2)(b) as a "rigid requirement"— the statement, at the same page, that the Commission has not permitted "the §207 proceedings in this case to be used as a device to evade §5(2)(b) re-

strictions"—indeed the whole tenor of the opinion—strongly support our argument. In addition, it is further reinforced by Mr. Justice Frankfurter's dissent in *Schaffer Transportation Co. et al* v. *U. S. et al.*, — U. S. —, 78 S. Ct. 173, wherein he refers to the decision in the *American Trucking Associations* case as "a striking illustration of the difference between the limitation to which the Commission is subjected in a proceeding under §5(2)(b) of the Interstate Commerce Act * * * and the requirements of section 207 of that Act, * * * although both relate to motor carrier service by railroads." 78 S. Ct. at 178-179.

Since the language of the proviso of §5(2)(b) is a "rigid requirement" in acquisition cases, it will not do, as appellee attempts, to shrug it off with the assertion that the Commission does not share these appellants' opinion respecting its construction. This Court has spoken on the subject and its words leave no room for equivocation. If—as we believe the Court has now made clear—the Commission lacks the basic power to issue unrestricted motor-carrier operating authority to a railroad or its affiliate pursuant to an application filed under §5 of the Interstate Commerce Act, the question of whether Frisco received such certificates as a result of the Commission's inadvertence is purely academic. On the basis of its decision in the *American Trucking Associations* case we respectfully urge that the Court would be completely justified in summarily reversing the District Court's decision with instructions to remand the matter to the Commission for appropriate action in conformity with the mandate of the proviso of §5(2)(b).

The *Watson* Case Does Not Support the Decision of the Lower Court

Because appellee lays such great stress upon the *Watson* case (*Watson Bros. Transp. Co.* v. *U. S.*, 132 F. Supp.

905, affirmed 350 U.S. 302)[1] as authority for affirmance of the decision of the court below, a brief resume of its history seems in order. Watson's purpose in filing the application there involved was to "fill out" its authority by acquiring the right to haul explosives over all routes as to which it was certificated to transport general commodities; on sixty-nine of its eighty-four routes it already possessed authority to transport both categories of traffic. During the course of the hearing on the application, it developed that four government installations, not included in Watson's request for authority, and none more than a few miles off Watson's routes, had no motor carrier service whatever. 132 F. Supp. 906. When this became known, Watson's counsel moved to amend its application to include authority to serve the four installations, and counsel for protestants raised no objection provided that "[Watson's] counsel is agreeable to restricting the authority sought to service for the United States Government . . ." The examiner thereupon allowed the amendment. *Id.*, 906-907.

It thus becomes clear that whether Watson should have received a certificate authorizing only the transportation of explosives to the four installations (as contended by the Commission) or whether it was properly given authority to transport both explosives and general commodities, hardly constituted an important federal question worthy of full review by this Court. In the final analysis, Watson sought to render a complete service and the certificate issued authorized such service to the four government installations. Bearing in mind that protestants had no objection to broadening the application, so long as service to the United States Government was all that was sought, it seems obvious that had the all-inclusive certificate issued been "corrected" and revised to authorize only the transportation of explosives, Watson

[1] *Watson* is cited 10 times in appellee's motion to affirm.

would simply have filed another application requesting general-commodity authority to the four points involved, which in all probability would have met little or no resistance. These facts, plus those already set forth in our jurisdictional statement (pp. 6-8) make it clear that the alleged similarities between *Watson* and this case are far more apparent than real. In addition, appellee's contention[2] that our "attempt to distinguish the *Watson* case upon the ground that only lack of notice was the basis of the District Court's opinion and this Court's affirmance . . ." is a complete misstatement of our position. It completely overlooks, for example, our specific reference to the difference in status between Watson, an independent motor carrier, and Frisco, a rail subsidiary with respect to whom the language of the proviso of §5(2)(b) is specifically applicable.

The Commission Could Not Reverse its Prior Decision by The Mere Issuance of Compliance Orders

In our jurisdictional statement we urged (pp. 8-9) that the Commission could not, intentionally or otherwise, reverse its prior decisions, outside the record and without notice to the motor carrier protestants, respecting the authority to be issued to the rail subsidiary. Appellee's answer to this is its claim that the so-called compliance orders, issued prior to the certificates, constituted "notice of the Commission's intention to issue unrestricted certificates". (Appellee's Motion, pp. 15-16) This, of course, leaves unanswered the argument that the Commission, before it could validly reverse its prior conclusions reached in the underlying finance reports, would have had to give the motor-carrier protestants an opportunity to be heard, on the record, respecting the proposed change in the service to be authorized in the certificate to be ultimately issued to Frisco. Instead, ac-

[2] Motion to affirm, page 14.

cording to appellee's argument, the Commission did change its mind (we are not told when, where or why) and indicated that change by the issuance of the so-called compliance orders, evidenced by that reproduced as Appendix 1 to the motion to affirm. The inherent weakness in that argument, even when accepted at face value, is readily apparent. If the Commission, as alleged, changed its mind outside the record, the subsequent issuance of the compliance orders could not, *nunc pro tunc*, overcome the legal infirmity inherent in its previous failure to allow the motor-carrier protestants opportunity to be heard *before* deciding that the conclusions theretofore reached in its written reports were erroneous and should be reversed. Despite appellee's claim respecting the effect of the issuance of the compliance orders, one fact remains clear: The Commission, after public hearing, held that Frisco was to receive only so-called auxiliary and supplementary motor-carrier operating rights, which conclusion has not to this day been directly challenged by Frisco, and the Commission has never at any subsequent stage of these proceedings found that Frisco was entitled to any other type of motor-carrier operating authority.

Appellee's claim that the compliance orders constituted clear notice that the Commission intended to issue unrestricted certificates is not supported even by the language of the orders themselves. The very first paragraph of the order appended to the motion to affirm states, in part, "that the purchase of the operations herein involved having been approved and authorized, as provided in Section 213 of the Motor Carrier Act, 1935;". Bearing in mind that Section 213 (now included in §5) contains the very provisions which limit the Commission's power, when dealing with an application by a railroad or its affiliate to acquire a motor carrier, to authorization of so-called auxiliary and supplemental motor service, it is entirely logical that a recipient of the compliance order would assume that the quoted language indicated the Com-

mission's intention to ultimately issue a certificate in conformance with the restrictive language set forth in the cited section of the Act. This, we submit, is a far more plausible argument than that advanced by Frisco, particularly when it is kept in mind, as appellee admits, that independent motor carriers, prior to the issuance of the certificates, had challenged Frisco's right to conduct unrestricted motor operations.

It is interesting to contrast appellee's notions of fair play and proper procedure by the Commission, in its dealings with that agency, with its attitude insofar as the independent motor carriers vitally affected by those same dealings are concerned. We quote below a small portion of the argument by counsel for appellee, made before the District Court, when the Commission was attempting to introduce letters and memoranda from its dockets, admittedly relevant on the question of inadvertence, but which had not been introduced in the proceedings before the Commission:

> Now, on general principles memoranda from one section of the Commission to another section of the Commission is, if introduced in this manner completely hearsay and self-serving. If they propose that these, or if they state that these are necessary to the defense of this order, it seems to me that the order must be invalid on its face because if these things are necessary to sustain the finding of the order we have a situation where there was not evidence in the record before the Commission, and when I say record I mean record of the hearing before the Commission, on which the Commission could base its order. If they had to go outside of that hearing record and into their other files and take documents that were passed back and forth between sections of the Commission, clearly we were not given a fair trial because we were never confronted with these things. (Transcript of Argument below, June 19, 1956, page 44)

Thus it is seen that Frisco strenuously objected, at the argument below, to the introduction of material from the Commission's dockets on the ground that such material was "outside of that hearing record." But on the other hand, the same appellee can find no fault with the action which it alleges the Commission took wherein it is purported to have reversed its prior written decisions, confining the motor authority to be issued to Frisco to that auxiliary and supplemental to the train service of the parent railroad, and to have done so without even the pretense of a hearing and completely outside the record! Appellee insists, and properly so, on fair treatment by the Commission. Elemental fairness would seem to require equal consideration for the rights of the independent motor carriers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 23rd day of January, 1958, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Wayne H. Bigler, Esq., Assistant United States Attorney, U. S. Court House, St. Louis, Mo., and by mailing copies in duly addressed envelopes, with postage prepaid, to The Solicitor General and Maurice A. Fitzgerald, Esq., Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert Ginnane, Esq., its General Counsel, and to Charlie H. Johns, Jr., Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Frisco Transportation Company, by mailing copies of duly addressed envelopes, with airmail postage prepaid, to its attorneys Ernest D. Grinnell, James L. Homire, John E. McCullough, and Alvin J. Baumann, Esqs., at 300 Frisco Bldg., 906 Olive Street, St. Louis, Mo., and with postage prepaid, to Bernard G. Ostmann, Esq., Transportation Bldg., Washington 6, D. C.

4. On the Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, and Order of Railway Conductors and Brakemen of America, intervening defendants, by mailing a copy in a duly addressed envelope, with postage prepaid, to James L. Highsaw, Jr., their attorney, at 620 Tower Bldg., Washington, D. C.

PETER T. BEARDSLEY

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No. 15

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APPELLANTS' BRIEF

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---

APPELLANTS' BRIEF

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Missouri, Eastern Division (R. 163) is reported at 153 F. Supp. 572. The report and order of the Interstate Commerce Commission in *Frisco Transportation Company Ext.—Joplin—Miami* (R. 593) set aside in large part by the court below,[1] appears at 62 M.C.C. 367.

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[1] The District Court held that the Commission validly restricted the certificate issued to appellee Frisco covering the Bennett operations. See footnote 2, p. 3.

JURISDICTION

The judgment of the lower court (R. 175) was entered August 9, 1957, with findings of fact and conclusions of law (R. 177) filed August 12, 1957. This court noted probable jurisdiction (R. 195) on February 3, 1958, 355 U.S. 938, 78 S. Ct. 425. Jurisdiction to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. § 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding § 1, and Sections 5(2)(a) and (b) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(a) and (b), are set forth verbatim in the appendix hereto.

QUESTIONS PRESENTED

The following questions, in the order of their importance in these appellants' view, are presented by this appeal:

1. Whether the Interstate Commerce Commission is empowered to authorize a railroad or its affiliate to perform unrestricted motor vehicle operations through the purchase of certificates theretofore issued to independent motor carriers?

2. Whether the Commission, after clearly indicating in the underlying finance proceedings that the rail subsidiary was to perform only auxiliary and supplemental motor operations, could, without further proceedings and without notice to the motor-carrier protestants involved, validly issue unrestricted certificates to Frisco?

3. Whether the District Court erred in holding that the certificates involved were not issued inadvertently by the Commission?

STATEMENT

Appellee, herein sometimes called Frisco, is a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company. The portions of its motor-carrier operating authority involved in this appeal were all acquired by purchase of rights previously held by independent motor carriers.

Each of the reports issued by the Commission, authorizing the purchase by Frisco of the rights theretofore held by independent motor carriers, contained a finding that the rights sought were needed "to afford applicant and the railway means for developing coordinated rail-truck service," or a substantially similar finding. In addition, the authority granted was specifically made subject "to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said railway company, and shall not unduly restrain competition."[2] As noted by Judge Moore, dissenting below (R. 173), Frisco did not exercise its right to petition for reconsideration of the reports and orders issued in the finance cases, but went ahead and consummated the purchases.

Despite the clear indication that the Commission had no intention of authorizing Frisco to engage in unrestricted motor operations, in all-out competition with independent motor carriers and, indeed, its own rail parent, the certificates ultimately issued to the rail subsidiary contained neither specific limitations upon the operating authority granted nor a reservation of the right to subsequently impose such restrictions.

Upon complaint by nine independent motor carriers, alleging that Frisco was operating illegally, the Com-

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[2] Frisco—Purchase—Cooper, 15 M.C.C. 317 (R. 639), Frisco—Purchase—Hamm, 15 M.C.C. 320 (R. 633), and Frisco—Purchase—Parker, 25 M.C.C. 96, also embracing the Tolson purchase (R. 624).

mission, division 5, held that Frisco's performance of unrestricted motor service "has been and is unauthorized and should be discontinued." In addition, the underlying finance reports were reopened "for the purpose of determining, what, if any, conditions or restrictions should be imposed in the certificates to remove all doubt about the character of operations which [Frisco] was authorized to acquire and in which it is authorized to engage." *Campbell Sixty-Six Express, Inc.* v. *Frisco Transp. Co.*, 43 M.C.C. 641, 653. Upon reconsideration, the entire Commission held that Frisco was not operating unlawfully, but it did so upon the narrow ground that it could "look only to the certificates held by [Frisco] to determine whether it is engaging in unauthorized operations." 46 M.C.C. 222, 225. The Commission went on to hold, however, that its finding that Frisco was operating lawfully was not to "be taken as an indication that the certificates now held by [Frisco] may not be corrected to reflect the intent of the finding in the acquisition proceedings or that restrictions may not be imposed now in some or all of the certificates held by [Frisco] which will have the effect of limiting the service thereunder to that which is auxiliary to or supplementary of the rail service of its parent company and preclude it from performing a direct and independent motor common carrier service." *Ibid.*, 225.

The original finance cases were reopened. On reconsideration and after oral argument, the Commission concluded, as had its Examiners (R. 528) and Division 5 (53 M.C.C. 415; R. 559), that the certificates issued to Frisco could not authorize unrestricted motor-carrier operations in view of the fact that the underlying finance reports, pursuant to which the certificates were issued, authorized the rail subsidiary to perform only a limited motor-vehicle service, coordinated with that of its parent railroad. The Commission further concluded that the certificates had been issued inadvertently, and that they should be

cancelled and corrected certificates issued, so restricted as to insure that the motor operations of the rail subsidiary would be confined to service auxiliary to or supplemental of that of its rail parent. *Frisco Transp. Co. Ext.—Joplin—Miami*, 62 M.C.C. 367; R. 593.

Frisco brought this action in the District Court on May 20, 1955, to set aside the Commission's report and order last referred to. The District Court, Judge Moore dissenting, found that the Commission had issued the unrestricted certificates intentionally and not as a result of clerical error, and that the Commission's order requiring cancellation of the outstanding certificates and substitution therefor of restricted certificates was without evidentiary support, and constituted an attempt, contrary to section 212 of the Interstate Commerce Act (49 U.S.C. § 312), to revoke and change a certificate duly issued.

SUMMARY OF ARGUMENT

These appellants contend that the Commission lacks power in a proceeding conducted pursuant to the provisions of Section 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(b), to authorize a railroad or its affiliate to perform motor-carrier operations completely unrelated to the train service of the railroad. If our contention is correct, the certificates received by appellee in these proceedings are null and void, and the question of whether they were issued as the result of clerical error by the Commission is rendered academic. Only last term this Court, in *American Trucking Associations, et al. v. U. S., et al.*, 355 U. S. 141, 78 S. Ct. 165, had occasion to deal with the Commission's power, under Section 207 of the Interstate Commerce Act, 49 U.S.C. § 307, to issue unrestricted motor-carrier operating authority to railroads or their affiliates. In that case, this Court held that the Commission in a Section 207 case (involving extension of authority) was not governed by the "rigid requirements" of Section 5(2)(b) (involving purchase of

existing motor-carrier authority by railroads or their affiliates). The important difference, so far as the underlying statute is concerned, between that case and this is that here the "rigid requirements" of §5(2)(b) are directly applicable, unless they are simply to be read out of the statute. The decision of the court below does just that.

Assuming, *arguendo*, that the Commission is empowered, in a proper case, to authorize a railroad or rail affiliate to acquire, by purchase, rights to perform unrestricted motor operations, the Commission could not, in any event, have validly issued such authority to Frisco, considering the state of the record under consideration. The only formal proceedings conducted by the Commission (aside from those dealing with the question of whether the certificates were issued inadvertently) are the underlying finance cases.[3] In those cases the Commission's written reports, made after oral hearings, clearly informed all parties (including the independent motor carriers which had protested against the proposed purchases) that the rail affiliate was to perform only a restricted motor service limited to operations "auxiliary and supplemental" to the train service of its rail parent. There have been no further proceedings conducted by the Commission (and Frisco has never at any time sought such proceedings) to determine whether its original conclusion that Frisco should be limited to auxiliary and supplemental service should be reversed and unlimited motor-carrier service authorized. Appellee Frisco, while insisting that the Commission's action to correct the certificates to conform to the findings in the underlying finance cases is unfair to it and legally invalid, apparently sees nothing improper in the course of action which it claims the Commission followed, i. e., a change of mind completely outside the record as to the authority which Frisco should receive and the deliberate issuance

[3] See footnote 2.

of certificates authorizing the rail subsidiary to perform unrestricted motor service. Such a course of action, if followed, would constitute a flagrant violation of the rights of the independent motor carrier protestants in the underlying finance proceedings within the meaning of *Morgan* v. *U. S.*, 304 U.S. 1. These appellants are unwilling to accuse the Commission of such tactics, but prefer to assume the much more logical alternative—that the certificates issued by the Commission did not conform to the underlying finance reports solely as the result of clerical error.

ARGUMENT

The Commission Lacks Power to Issue Unrestricted Certificates to Railroads or Their Affiliates Under § 5(2)(b).

As this Court pointed out only recently in discussing the provisions of Section 5(2)(b) of the Interstate Commerce Act (formerly Section 213(a)(1) of the Motor Carrier Act of 1935), relating to acquisition of an existing motor carrier operation, "where a railroad or its affiliate is an applicant, the Congress directed the Commission 'not [to] enter such an order unless it finds that the transaction proposed' not only is in the public interest but 'will enable such [railroad] carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.'" *American Trucking Associations, Inc.* v. *U. S., supra,* 355 U. S. 147, 78 S. Ct. 169. That case, unlike this one, dealt with an application by a rail subsidiary to perform motor service pursuant to § 207 of the Interstate Commerce Act. In that case, appellants contended that the provisions of § 5(2)(b), precluding the Commission from granting motor rights—other than so-called auxiliary and supplemental rights[4]—

[4] The term "auxiliary and supplemental" is not contained in the statute itself, but has been consistently used by the Commission in interpreting the Congressional mandate expressed in § 5(2)(b). Cf. *American Trucking Associations* case 355 U.S. 147-148, 78 S. Ct. 169.

to railroads or their affiliates, must be read into the provisions of § 207 whenever a railroad or its affiliate applied for operating authority under the latter section. This Court disagreed with appellants, saying (355 U.S. 150, 78 S. Ct. 171):

> We conclude, therefore, that the Congress did not intend the rigid requirement of § 5(2)(b) to be considered as a limitation on certificates issued under § 207.

The Court went on to hold however, at the same page of the opinion, that "the underlying policy of § 5(2)(b) must not be divorced from proceedings under § 207. * * * But for reasons we have stated we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a § 207 proceeding."

We should have thought the Court's decision in the cited case made two things clear: first, that the Commission is required to apply the policy underlying § 5(2)(b) even in § 207 cases except in the face of the exceptional circumstances found to be present in the proceeding there under consideration; second, that in a Section 5 case such as this the provisions of § 5(2)(b) are directly applicable and the Commission has no choice but to limit any grant of motor authority awarded a railroad or its affiliate to auxiliary and supplemental service. In addition to the clear and concise language of this Court's opinion in the cited case, this latter conclusion is further buttressed by Mr. Justice Frankfurter's dissent in *Schaffer Transportation Co.* v. *U. S.*, 355 U. S. 83, 93, 78 S. Ct. 173, 179, wherein he refers to the decision of the *American Trucking Associations, Inc.*, case as a "striking illustration of the difference between the limitation to which the Commission is subjected in a proceeding under § 5(2)(b) of the Interstate Commerce Act * * * and the requirements of section 207 of that Act, * * * although both relate to motor carrier service by railroads."

Although these appellants urged upon the court below, both on brief [5] and oral argument,[6] the contention that Congress had not empowered the Commission to allow railroads or their affiliates to institute unrestricted truck service by purchase of an existing motor operation, the opinion of the Court nowhere deals with the question.

We respectfully submit that the question of the Commission's power, or lack thereof, to authorize a railroad or its affiliate, through the medium of a purchase proceeding subject to the provisions of § 5(2)(b), to perform motor operations unrelated to those of the acquiring railroad, is the most important question presented in this proceeding. This Court's decision in the *American Trucking Associations* case clearly delimited the Commission's power under § 207 insofar as railroad motor operations are concerned; an additional interpretation by this Court of the Commission's power under § 5(2)(b) is needed, in order that the Commission, and the independent motor carriers and railroads subject to its jurisdiction, may have a clear understanding of the limits, if any, to its authority under that section of the law. Although we believe that the language of § 5(2)(b) makes it crystal clear that the Commission may not permit railroads to conduct all-out motor operations thereunder, the Com-

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[5] We quote a short portion of the section of our brief entitled "Limitations of Section 5(2)(b)" filed in the court below:

"It is apparent, therefore, that the only certificate that lawfully could be issued to the complainant and the only authority that was within the power of the Interstate Commerce Commission to confer upon consummation of the proposed purchase was for the rendition of service by motor vehicle by the complainant in connection with the rail operations of the parent railroad company. In other words, the Commission could only authorize the acquisition of motor-carrier rights insofar as they permitted complainant to render auxiliary and supplemental motor vehicle service, tied in with the operations of its parent railroad."

[6] R. 88-90.

mission, at the argument below, took the opposite position (R. 145):

> Judge Van Oosterhout: Of course, in a particular case, the Commission would have had power if the record justified it to issue an unrestricted certificate?
> Mr. Johns [Counsel for the Commission]: Now, we say yes; the ATA says no. * * *

We respectfully submit that a decision on the question of inadvertence, while of course important, will necessarily be limited to the facts of this particular case and thus have little precedent value. On the other hand, should the Court see fit to pass squarely on the question of the Commission's power under § 5(2)(b), that thorny problem in the Commission's administration of the Interstate Commerce Act will have been settled once and for all. We do not suggest that the Court not decide the question of inadvertence. Both questions are properly before it, and we see no reason why both should not be decided. But we recognize that the Court may, if it agrees with appellants, dispose of the case by either avenue. We therefore respectfully urge that should the Court decide not to deal with both questions, an interpretation of the Commission's authority under § 5(2)(b) can be expected to substantially reduce litigation before that body, as well as in the federal courts.

The Commission is currently processing purchase applications by railroads and their affiliates in a manner which we believe largely ignores the specific statutory provisions limiting its power in such cases. For example, in Docket No. MC-F-6643; *Burlington Truck Lines, Inc.—Purchase—Hobby,* the Commission's Division 4, in a report and order of August 6, 1958, authorized the wholly-owned subsidiary of the Chicago, Burlington & Quincy Railroad to acquire the operating rights of vendor, an independent motor carrier, without the imposition of any operating restrictions whatsoever. In Docket No.

MC-F-6688; *Santa Fe Trail Transp. Co.—Purchase—Payne,* Division 4, in a report and order dated July 30, 1958, authorized the wholly-owned subsidiary of the Atchison, Topeka and Santa Fe Railway to acquire the operating rights of the vendor, an independent motor carrier, with restrictions imposed as to some, *but not all,* the points authorized to be served. Again in Docket No. MC-F-6528; *Burlington Truck Lines, Inc.—Purchase—Love,*[7] the rail subsidiary was authorized to acquire the rights of the independent motor carrier vendor, by a report and order of Division 4, dated May 7, 1958, with operating restrictions applied to only a portion of the points authorized to be served. In view of the language of the proviso of § 5(2)(b), these appellants believe that the Commission should not even entertain a railroad application to perform unrestricted service through the purchase of existing motor operations. Yet it does so continually. For example, the Commission has scheduled a hearing for September 22, 1958, in Docket No. MC-F-6905; *New York Central Transport Co.—Purchase—Truck Transport Co.,* in which the wholly-owned subsidiary of the giant rail system seeks to acquire, with no restrictions whatever, the vendor's motor-carrier operating authority between points in the States of Michigan, Ohio, Illinois, Indiana, and New York, including such important commercial centers as Detroit, Pontiac and Flint, Michigan, Cincinnati, Toledo and Sandusky, Ohio, Indianapolis and Muncie, Indiana, and Waukegan, Ill.[7a]

We cite the cases referred to, and we could have cited more, solely to emphasize to the Court the great need for its interpretation of the Commission's power under § 5(2)(b), which we respectfully submit is currently being gravely misconstrued by that agency in contravention of the clearly expressed intent of Congress. In short,

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[7] Pending before the Commission on reconsideration.

[7a] The railroad and vendor have recently requested dismissal of the application.

though the Congressional policy expressed in the proviso of § 5(2)(b) is couched in clear language, the Commission stifles it by "a pedantic or grudging process of construction." *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 617, 64 S. Ct. 1215, 1221. Anticipating the contention that the Commission's failure to follow the express mandate of the proviso of § 5(2)(b) should be sanctioned as representing its "consistent construction," we can think of no better answer than this Court's own statement that "even consistent error is still error." *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 678, fn. 5.

The Commission Could Not, In Any Event, Have Validly Issued Unrestricted Certificates to Frisco

This portion of our argument assumes that the Commission has power, despite the clear language of the proviso of § 5(2)(b), to issue unrestricted motor operating authority to railroads or their affiliates. Even so, we submit that the Commission could not, intentionally or otherwise, validly reverse its decisions in the underlying finance cases, outside the record and without notice to the motor-carrier protestants in those cases, respecting the authority to be conferred upon the rail subsidiary. Only Judge Moore, dissenting below, seems to have given this phase of the case any consideration:[8]

> I cannot see that Transportation Company's case would be any stronger if I were in fact persuaded that the omissions from the finance orders and certificates were intentional. I do not see how plaintiff could justify changes in the Commission's findings made without giving notice, or an opportunity to be heard to those appearing at the acquisition proceedings. 49 U.S.C.A. Sec. 305(a).

Here again, the majority below did not discuss this phase of the case in its opinion. We respectfully suggest that the majority became so engrossed with the

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[8] 153 F. Supp. 579; R. 173.

Watson case, which we later discuss and distinguish, that it somehow overlooked the fact that there were other, very live issues, vigorously urged on brief and in oral argument, in addition to the issue of inadvertence.

The majority below, in holding that the certificates were not issued inadvertently, seems to lean heavily on the fact that "intervening between the issuance of the finance report and the certificates in question, was the issuance by the Commission of compliance orders, which did not contain the limitation contained in the findings in the finance proceedings." 153 F. Supp. 576, R. 168. The majority seemed to feel that it is significant that "The action of the Commission in adopting the finance hearing report was not unanimous." *Ibid.*, R. 168-169.

Taking the latter point first, it is true that each of the decisions in the underlying finance cases[9] contains the bare notation "Commissioner Rogers dissents." The majority below apparently construed this as indicating that Commissioner Rogers favored a grant to Frisco of unrestricted authority. Such a construction, we submit, is shown to be erroneous by the very fact that Commissioner Rogers participated (as a member of Division 5) in one of the subsequent decisions dealing with the question of inadvertence,[10] and cast his vote, as did the other members of the division, in favor of revoking the outstanding certificates and reissuing them in conformance with the findings in the underlying finance cases.[11] This course of action hardly supports an assumption that Commissioner Rogers favored a grant of unrestricted operating authority to Frisco.

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[9] See footnote 2.

[10] Commissioner Rogers resigned from the Commission in April, 1952. The report of the entire Commission was not rendered until December, 1958. R. 593.

[11] 53 M.C.C. 415; R. 559.

We come next to the argument implicit in the decision of the majority below that the issuance of the unrestricted compliance orders, after the finance case decisions but prior to the issuance of the certificates, constituted notice that the Commission had reversed its intention, expressed in the original finance cases, to issue only limited authority to Frisco.[12]

Assuming, *arguendo,* that the issuance of the compliance orders did constitute notice of the Commission's intent to issue unrestricted certificates, the fact still remains that the motor-carrier protestants in the original finance cases were given no opportunity to be heard respecting the proposed change in the authority to be granted Frisco. Frisco's argument amounts to this: The Commission, after conducting open hearings and having reached one conclusion, expressed in its written reports, subsequently, through some form of "star chamber" process, reached an opposite conclusion which it first revealed by the issuance of the so-called compliance orders. Such a procedure would violate both the letter and the spirit of the law which the Commission administers. It should also be noted that the issuance of compliance orders is actually performed by clerical employees. Are we to assume also that the Commission somehow (again outside the record) conveyed to these subordinate employees its "change of heart" respecting the authority to be granted? The course of action attributed to the Commission by the majority below would, we submit, meet head-on with this Court's decision in *Morgan* v. *U. S.*, 304 U. S. 1, 18:

> The right to a hearing embraces not only the right to present evidence, but also a reasonable opportu-

[12] The opinion of the majority below does not so hold explicitly, but we believe we have fairly construed it in this respect. In addition, appellee specifically contends that the issuance of the compliance orders constituted "notice of the Commission's intention to issue unrestricted certificates." Appellee's Motion to Affirm, p. 16.

> nity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one.

We submit that Judge Moore correctly sized up the situation in finding that the unrestricted certificates were issued due to the fact that "rail-affiliated motor carrier applications for authority * * * were a distinct minority of the total number of motor carrier service authorizations sought in the 'thirties and the 'forties; no doubt those charged with the responsibility of issuing compliance orders and operating certificates found it easy to omit the proviso which was required on only a few of the motor carrier certificates with which the Section of Certificates dealt." 153 F. Supp., 578-579, R. 173.

In its motion to affirm, appellee suggests that "the standard practice" was for any interested party who considered a so-called compliance order to be incorrect to "file a protest." The appellee continues: "It will thus be seen that the standard practice (followed here) provided for the very type of notice which appellants now claim was denied in this case." Motion to Affirm, pp. 15, 16. Such a strained construction overlooks the basic principles underlying the Interstate Commerce Act itself. In enacting that statute, Congress did far more than establish ground rules for the conduct of litigation between private parties. Considering the great public purpose underlying the statute itself and particularly the limits imposed on the Commission's authority by the proviso of § 5(2)(b), we submit it is idle to argue that the independent motor-carrier protestants in the original finance cases could have, even had they wished to, waived the right to protection from railroad monopoly written into the provisions of the statute governing rail acquisition of motor rights. This for the obvious reason that Congress limited rail acquisition of motor-carrier rights

primarily to protect the public; any benefit conferred upon their motor-carrier competitors is merely incidental.

Acceptance of appellee's contention would bring about a strange procedural result. Frisco had sought to acquire the motor operations involved in these proceedings from the independent motor carriers holding the franchises. The Commission's reports, approving the purchases, made it plain that appellee was to acquire only the right to perform motor operations coordinated with the train service of its rail parent. At this stage of the proceeding the burden was certainly on the rail affiliate, if it wished to secure unrestricted motor authority, to petition for reconsideration of the Commission's decisions in the finance cases. This it has not done to this day! Instead, it suggests that the burden of going forward with the case rested with the motor-carrier protestants when the compliance orders were issued. We believe the mere statement of the proposition demonstrates its absurdity.

Frisco's motion to affirm included as an appendix (p. 31) a copy of one of the so-called compliance orders, issued in connection with the *Hamm* purchase by Frisco. This is the Commission form which appellee claims constituted notice to the motor-carrier protestants that the Commission had changed its mind, since the form contains no specific restriction nor the reservation of the right to restrict Frisco's operations in the future. We submit that this is the most hypertechnical of arguments, which finds no support even in the language of the compliance order itself. The very first paragraph of the order states, in part: "It appearing * * * that the purchase of the operations herein involved having been approved and authorized, as provided in Section 213 of the Motor Carrier Act, 1935; * * *." Bearing in mind that Section 213 (now included in § 5) contains the very provisions which limit the Commission's power, when deal-

ing with an application by a railroad or its affiliate to acquire a motor carrier, to authorization of so-called auxiliary and supplemental motor service, it is entirely logical that a recipient of the compliance order would assume that the quoted language indicated the Commission's intention to ultimately issue a certificate in conformance with the restrictive language set forth in the cited section of the Act and adhered to in the Commission's reports in the underlying finance cases. This, we submit, is a far more plausible argument than that advanced by Frisco, particularly when it is kept in mind, as appellee admits, that independent motor carriers, prior to the issuance of the certificates, had challenged Frisco's right to conduct unrestricted motor operations.

The opinion of the majority below relies so heavily upon the *Watson* case (*Watson Bros. Transp. Co.* v. *U. S.*, 132 F. Supp. 905; aff'd. 350 U. S. 302) that we believe a brief discussion of that case is in order.

Watson, an independent motor carrier (unlike appellee here) filed application pursuant to § 206 of the Interstate Commerce Act to "fill out" its authority by extending its rights to haul explosives over all routes as to which it was certificated to transport general commodities; on sixty-nine of its eighty-four routes it already possessed authority to transport both categories of traffic. During the course of the hearing on the application, it developed that four government installations, not included in Watson's request for authority, and none more than a few miles off Watson's routes, had no motor carrier service whatever. 132 F. Supp. 906. When this became known, Watson's counsel moved to amend its application to include authority to serve the four installations, and counsel for protestants raised no objection provided that "[Watson's] counsel is agreeable to restricting the authority sought to service for the United States Government . . ." The examiner thereupon allowed the amend-

ment. *Ibid.*, 907. After some four years of operations, the Commission, without notice or hearing, issued an order purporting to correct its outstanding certificate. Under these circumstances, the District Court in the *Watson* case held that the Commission's action was invalid.

It thus becomes clear that whether Watson should have received a certificate authorizing only the transportation of explosives to the four installations (as contended by the Commission) or whether it was properly given authority to transport both explosives and general commodities, hardly constituted an important federal question worthy of full review by this Court. In the final analysis, Watson sought to render a complete service and the certificate issued authorized such service to the four government installations. Bearing in mind that protestants had no objection to broadening the application, so long as service to the United States Government was all that was sought, it seems obvious that had the all-inclusive certificate issued been "corrected" and revised to authorize only the transportation of explosives, Watson would simply have filed another application requesting general-commodity authority to the four points involved, which in all probability would have met little or no resistance.

We submit that *Watson* and this case are entirely dissimilar. First, in *Watson* the motor carirer was subject to no statutory disability as is the rail affiliate here. Second, Watson was given no notice or opportunity to be heard prior to the issuance of the order purporting to revoke its certificate; here, of course, Frisco was given notice, a full hearing, and the privilege of oral argument before the entire Commission. Finally, there was no specific indication in the original report (the examiner's report was ultimately adopted by the Commission) that Watson's authority to the four installations was to

be any different than the authority granted to the other points as to which Watson sought to render a complete service. Here again the rail affiliate, unlike Watson, knew from the very beginning that it was not to be given the right to conduct an all-out truck service. These differences, we submit, demonstrate the error of the majority below in relying upon *Watson* as precedent for the decision here under review.

CONCLUSION

For the reasons stated, it is submitted that the judgment of the court below should be reversed and the case remanded with instructions to dismiss the complaint, and for further proceedings consistent with this Court's opinion, and that this Court grant such further relief as it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 25th day of August, 1958, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Wayne H. Bigler, Esq., Assistant United States Attorney, U. S. Court House, St. Louis, Mo., and by mailing copies in duly addressed envelopes, with postage prepaid, to The Solicitor General and Maurice A. Fitzgerald, Esq., Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert Ginnane, Esq., its General Counsel, and to Charlie H. Johns, Jr., Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Frisco Transportation Company, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to its attorneys Ernest D. Grinnell, James L. Homire, John E. McCullough, and Alvin J. Baumann, Esqs., at 300 Frisco Bldg., 906 Olive Street, St. Louis, Mo., and with postage prepaid, to Bernard G. Ostmann, Esq., Transportation Bldg., Washington 6, D. C.

4. On the Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, and Order of Railway Conductors and Brakemen of America, intervening defendants, by mailing a copy in a duly addressed envelope, with postage prepaid, to James L. Highsaw, Jr., their attorney, at 620 Tower Bldg., Washington, D. C.

PETER T. BEARDSLEY

APPENDIX

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901, 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

• • • •

COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

Sec. 5. [*As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, June 19, 1934, August 9, 1935, September 18, 1940 and August 2, 1949.*] [*49 U. S. C. § 5.*]

• • • •

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for

public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

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MOTION TO RETAX COSTS

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 15

PUBLIC SERVICE COMMISSION OF UTAH and UTAH CITIZENS RATE ASSOCIATION,
Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WSETERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY,
THE WESTERN PACIFIC COMPANY,
UTAH RAILWAY COMPANY,
BAMBERGER RAILWAY COMPANY,
TOOELE VALLEY RAILWAY COMPANY,
SALT LAKE, GARFIELD AND WESTERN RAILWAY COMPANY,
THE OGDEN UNION RAILWAY AND DEPOT COMPANY,
Appellees.

CALVIN L. RAMPTON
Counsel of Record for Appellants,
E. R. CALLISTER
Attorney General of Utah
RAYMOND W. GEE
Asst. Attorney General
KEITH SOHM
Commerce Attorney for the Utah Public Service Commission
Attorneys for Appellant, Public Service Commission of Utah

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 15

PUBLIC SERVICE COMMISSION OF UTAH and UTAH CITIZENS RATE ASSOCIATION,
Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WSETERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY,
THE WESTERN PACIFIC COMPANY,
UTAH RAILWAY COMPANY,
BAMBERGER RAILWAY COMPANY,
TOOELE VALLEY RAILWAY COMPANY,
SALT LAKE, GARFIELD AND WESTERN RAILWAY COMPANY,
THE OGDEN UNION RAILWAY AND DEPOT COMPANY,
Appellees.

MOTION TO RETAX COSTS

COME NOW the appellants in the above entitled action and move the court for an Order, re-taxing costs in the amount of $4723.03 against the appellees, The Denver and Rio Grande Western Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, The Western Pacific Company, Utah Railway Company, Bamberger Railroad Company, Tooele

Valley Railway Company, Salt Lake Garfield and Western Railway Company and the Ogden Union Railway and Depot Company.

This motion is made upon the following grounds:

1. That heretofore, to-wit, on May 19, 1958 this Court rendered its decision in favor of the appellants in said action and against the appellees therein reversing the judgment of the District Court theretofore entered and remanding said cause to that court with instructions to set aside the order of the Commission and remand the cause to the Commission for further proceedings in conformity with said opinion of this Court.

2. That in proceedings in the District Court below and in the Supreme Court of the United States the parties who appeared as intervenors in the District Court, being all of the appellees in the action, except the United States of America and the Interstate Commerce Commission, were and are the true parties in interest in said action and did and do have a true and real interest in the proceedings and the outcome thereof, and did take a real and substantial part in the proceedings and in the presentation of issues on behalf of the defendants and appellees, both in the District Court and in the Supreme Court of the United States.

3. That under Rule 57, Subsection 2 of the Revised Rules of the Supreme Court of the United States, it is provided as follows:

> "2. In cases of reversal or vacating of any judgment or decree of this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case."

4. That although the United States of America and the Interstate Commerce Commission were parties to said action, and that although under Rule 57, subsection 5, it is provided that no costs shall be allowed "either for or against the United States or any officer or agency thereof * * * * * ", nevertheless such subsection under said rule does not apply to nor prohibit the taxing of costs against parties other than the United States, under subsection 2 of said rule, even though the United States or one of its agencies may also be a party to said action.

5. That the governing part of said Rule 57 is subsection 2 thereof and that under the provision thereof costs should be taxed against each and all of the appellees herein except the United States of America and the Interstate Commerce Commission.

6. That the costs in the above entitled action as furnished to appellants by the Clerk of said Court are as follows:

Clerk's costs	$ 794.28
Printing costs	3928.75
Total	$4723.03

7. This motion is made under the provisions of Rule 35 of the Rules of the Supreme Court of the United States.

For the reasons and upon the grounds hereinabove set forth, appellants move the court for an Order taxing costs in the amount of $4723.03 against each of the appellees above named except the United States of America and the Interstate Commerce Commission.

Respectfully submitted,

CALVIN L. RAMPTON

Counsel of Record for Appellants

721 *Cont'l Bank Bldg.*
Salt Lake City, Utah

E. R. CALLISTER
Attorney General of Utah

RAYMOND W. GEE
Assistant Attorney General

KEITH SOHM
Commerce Attorney for the Utah Public Service Commission

Attorneys for Appellant, Public Service Commission of Utah
State Capitol
Salt Lake City, Utah

PROOF OF SERVICE

I, CALVIN L. RAMPTON, counsel of record for appellants and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of August, 1958, I served, on behalf of the appellants herein, copies of the foregoing Motion to Tax Costs, as follows:

1. On the United States, by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200, Federal Building, Salt Lake City, Utah, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., and to Stanley N. Barnes, Assistant Attorney General, Department of Justice, Washington, D.C.

2 On the Interstate Commerce Commission, by mailing

a copy in an addressed envelope, with air mail postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and Charles H. Johnson, Assistant Counsel, at the offices of the Commission, Washington 25, D.C.

3. On the intervening defendants by mailing copies in addressed envelopes, with first class postage prepaid, to their respective counsel of record as follows:

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Tooele Valley Railway Company and Utah Railway Company
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CALVIN L. RAMPTON
Counsel of Record for Appellants

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No. 15

In the Supreme Court of the United States

OCTOBER TERM, 1957

o———o———o

Public Service Commission of Utah and Utah Citizens Rate Association,

Appellants,

v.

United States of America and Interstate Commerce Commission,
The Denver and Rio Grande Western Railroad Company,
Union Pacific Railroad Company,
Southern Pacific Company,
The Western Pacific Railroad Company,
Utah Railway Company,
Bamberger Railroad Company,
Tooele Valley Railway Company,
Salt Lake, Garfield and Western Railway Company,
The Ogden Union Railway and Depot Company,

Appellees.

o———o———o

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

o———o———o

OPPOSITION TO APPELLANTS' MOTION TO TAX COSTS AGAINST RAILROAD APPELLEES

o———o———o

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No. 15

In the Supreme Court of the United States

OCTOBER TERM, 1957

Public Service Commission of Utah and Utah Citizens Rate Association,

Appellants,

v.

United States of America and Interstate Commerce Commission,
The Denver and Rio Grande Western Railroad Company,
Union Pacific Railroad Company,
Southern Pacific Company,
The Western Pacific Railroad Company,
Utah Railway Company,
Bamberger Railroad Company,
Tooele Valley Railway Company,
Salt Lake, Garfield and Western Railway Company,
The Ogden Union Railway and Depot Company,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

OPPOSITION TO APPELLANTS' MOTION TO TAX COSTS AGAINST RAILROAD APPELLEES

Appellants' motion (typewritten copy of which was received July 30, 1958, by counsel for the railroad appellees) moves the Court for an order taxing the full amount, $4,723.03, of the costs of their appeal against the railroad appellees, The Denver and Rio Grande Western Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, The Western Pacific Railroad Company, Utah Railway Company, Bamberger Railroad Company, Tooele Valley Railway Company, Salt

Lake, Garfield and Western Railway Company, and The Ogden Union Railway and Depot Company.

The amended complaint in the District Court named the United States of America and the Interstate Commerce Commission as defendants but did not name the above-named railroads as defendants (R. 1). Those railroads, however, were allowed to intervene in the District Court as parties defendant (R. 27), but were brought here as "intervenors" named in appellants' notice of appeal to this Court (R. 75).

Paragraph 2 of the motion states:

> "That in proceedings in the District Court below and in the Supreme Court of the United States the parties who appeared as intervenors in the District Court, being all of the appellees in the action, except the United States of America and the Interstate Commerce Commission, were and are the true parties in interest in said action and did and do have a true and real interest in the proceedings and the outcome thereof, and did take a real and substantial part in the proceedings and in the presentation of issues on behalf of the defendants and appellees, both in the District Court and in the Supreme Court of the United States."

It then clearly appears that the real reason for the motion to tax the full amount of the costs against the railroad appellees is the fact that, because of subsection 5 of Rule 57, appellants may not recoup their costs from the parties they named as defendants.

Rule 57, subsection 2, provides that in case of reversal costs shall be allowed to the appellant, "unless otherwise ordered by the court." But, clearly, appel-

lants, contrary to their assumption, are not by this rule guaranteed recoupment of their costs. The reservation, "unless otherwise ordered by the court", leaves the Court free to deny appellants their costs or to apportion costs, under proper circumstances. Nor is subsection 2, Rule 57, a guarantee that in a case like this, where the United States is the statutory defendant and the losing party, the Court will search for some other party to bear appellants' costs of their appeal.

A fair interpretation of subsection 2 of Rule 57 is that it leaves the taxing of costs to the discretion and judgment of the Court to be exercised fairly and equitably in the light of the circumstances in a particular case. It is the position of the railroad appellees that the taxing of costs against them in this case is neither required nor authorized by any rule of this Court, that the taxing of costs against them would be unreasonable, unjust and inequitable, and that appellants' motion should be denied for the following reasons:

1. Appellants named the United States of America as the defendant in their amended complaint in the District Court because the statute expressly so required and they could not have brought their suit without compliance with the statute. Title 28, U. S. Code, sections 2321, 2322. The complaint also named the Interstate Commerce Commission as a defendant, but did not name the railroads (R. 1). Appellants had, or were chargeable with, knowledge that the rules of this Court do not allow appellants to recoup their costs by taxing them against the United States of America or any agency thereof. While the railroads did intervene in the District Court, were brought by appellants to this Court and took such part as they were allowed or permitted to

take in the proceedings, it could not be true, as alleged by appellants, that the railroad appellees "were and are the true parties in interest in said action", in the face of the statute expressly requiring the naming of the United States of America as the defendant.

2. While it is true that their anxiety over their financial interest caused the railroads to intervene below, this clearly is no reason for substituting them for the statutory defendant, United States of America, merely to enable appellants to recoup their costs. Appellants' suggestion, in paragraph 2 of their motion, that, because the railroads intervened below in the hope of protecting their financial interest, they may now be treated as either superseding or displacing the statutory defendant, United States of America, is unrealistic and misconceives the functioning of the United States in these suits to enjoin orders of the Interstate Commerce Commission. While the intervenors take such part as their inferior position as intervenors permits, the United States is in control of the case and takes the dominant position in its presentation to this Court. For example, the presentation of oral argument in this case by counsel who spoke for the United States and the Commission left the railroad appellees only about 15 minutes, regardless of their financial interest, for presentation of such argument as they could make in that time.

The presence of the United States is no guarantee or assurance that the interests of railroad intervenors in the Commission's orders will be protected or defended by counsel for the United States, even in its dominant position as statutory defendant. Indeed, the United States asserts the prerogative to defend or not to defend an order of the Commission, *I. C. C. v. Oregon-Washington R. Co.*,

288 U. S. 14, and even to change position and confess invalidity of the Commission's order in the middle of the litigation, *Schaffer Transportation Co. v. U. S.*, 355 U. S. 83. Thus, railroads having the financial interest intervene or not at their peril. If they do not intervene, their interest may have no representation, since their position may be abandoned and even attacked as invalid by counsel for the United States; or, if they intervene, they risk having to pay appellants' costs in the event the appeal results in a reversal against the United States as statutory defendant.

3. The Public Service Commission of Utah has long since inflicted far more than enough financial loss on the Utah railroads to avenge the resentfulness of any state against the 38-year-old purpose of Congress to make intrastate traffic contribute a fair proportionate share of revenues essential to maintain an adequate national railway system. As pointed out by this Court in *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 585, the Congress, by Transportation Act, 1920, for the first time:

> "'* * * imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. * * * Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system.'"

To prevent the states from defeating this national purpose, the Congress gave the Commission power, in what is now Section 13(4) of the Act, to remove unjust discrimination caused by unduly low intrastate rates against interstate commerce by prescribing and requir-

ing observance of adequate intrastate rates "* * * the law of any State or the decision or order of any State authority to the contrary notwithstanding."

From this new Congressional plan, designed for the national welfare of the United States, the Utah Commission promptly "seceded". From that day to this, the Utah commission, as pointed out at pages 20-24 of the railroad appellees' brief in this case, has steadfastly resisted the plan for an adequate national railway system by refusing in every general rate increase authorized by the Interstate Commerce Commission, to permit increases in Utah intrastate rates commensurate with those authorized for interstate traffic. Thus, through one or another strategy or tactic, involving frustration or defeat in whole or in part of the revenue purposes of the 1920 Act, the Utah commission has succeeded in inflicting revenue losses upon the Utah railroads amounting literally to millions of dollars, the amount of such *annual loss* being estimated by the Commission at $1,880,000 in this case (R. 97).

That this intransigeant attitude of the Utah commission is political resistance by a state against Federal sovereignty, rather than a reflection of the desires, demands or insistence of the Utah shippers, who pay all but a very insignificant part of the revenues resulting from increased rates on Utah intrastate traffic, is shown by the Commission's report in *Utah Intrastate Freight Rates and Charges,* 287 I. C. C. 315, where, at page 319, it is pointed out that the Utah commission permitted only half of the Ex Parte No. 166 increase authorized by the Commission in interstate rates on iron ore, and refused to allow the full increase until Utah intrastate shippers

of iron ore, who had not opposed the full increases, gave their expressed consent to the Utah commission to the full amount of the increase authorized by the Commission.

Even in the instant case, as pointed out at pages 35-36 of the railroad appellees' brief, the record shows (negatively, of course) that no shipper or receiver, who actually bears the financial result of increased freight rates, opposed the 15% increase in Utah intrastate rates in this case, except T. C. Taylor (R. 400), who appeared in opposition on behalf of the Ideal Cement Company; that the increase in intrastate rates on coal was opposed not by freight rate payers but by a representative of the Utah Coal Operators' Association, and that the rates on manufactured iron and steel articles and class rates and the increases in rates on ores and concentrates were opposed not by freight rate payers, but by the Utah Citizens Rate Association (an appellant here) and the Utah Mining Association, respectively. In other words, the record before the Commission will be searched in vain for any opposition by any shipper or receiver who actually pays freight rates on the following commodities, which constitute the intrastate freight traffic, (except cement) on which the increases in intrastate freight rates were sought:

Coal
Coke
Iron Ore
Manufactured Iron and Steel Articles
Lead and Zinc Ores, and Ores and Concentrates
Uranium and Vanadium Ores
Waste Materials for Remelting
Clay and Bentonite
Sand and Gravel
Lime Rock
Fuel and Road Oil
Gasoline
Sugar
Wheat
Animal and Poultry Feed
Sheep and Goats
Cattle and Calves
Class and Merchandise Rates

As shown in the Commission's report (R. 105), the railroads' annual revenue loss resulting from refusal of the Utah commission to grant the increases in intrastate rates on iron ore alone was $634,680; that the railroads' revenue loss due to refusal of the Utah commission to permit the sought increases on intrastate movements of coal in Utah was $572,598 annually; and that annual revenue loss to Utah railroads in intrastate movements of lead and zinc ores and concentrates amounts to $85,770 annually. Thus, the total of railroads' annual revenue losses on the three commodities resulting from refusal of the Utah commission to grant the increases, not opposed by any shipper or freight rate payer, amounted to $1,093,048. The amounts of revenue loss from the refusal of the Utah commission to grant increases in rates on other commodities are not shown of record, but, as stated above, the increases were not opposed by any shipper or freight rate payer on any of the com-

modities but only by three professional and perennial objectors, as indicated above. Notwithstanding this lack of appearance or opposition of Utah intrastate *shippers* to the increases needed for revenue purposes, the Utah commission in this case persists in its long resistance against any co-operation in the national plan for maintenance of an adequate railway system, which persistence has already cost the railroads in Utah untold millions of dollars in revenue losses.

The posture of the other appellant, Utah Citizens Rate Association, is not ascertainable from the record. Its Traffic Manager stated (R. 369) that it acted in a consultant capacity for members of that Association, consisting of wholesalers and some manufacturers, but there is no indication that any members of the Association are shippers or receivers who pay and bear freight charges on Utah intrastate freight shipments.

Moreover, appellants' motion for taxation of costs may well be premature, in view of this Court's direction that the cause be remanded to the Interstate Commerce Commission for further proceedings, which undoubtedly will result in a valid order prescribing the same rates prescribed by the order dealt with in this Court's opinion, particularly in view of amendments to Section 13(4) of the Interstate Commerce Act enacted by Transportation Act of 1958 since the Court rendered its decision in this case.

As a matter of unrefined justice and equity, stripped of confusion and thought-crippling technicalities, the railroad appellees submit that they should not be taxed

with the cost of appellants' appeal in this case, and that their motion should be denied.

Respectfully submitted,

ELMER B. COLLINS,
Counsel of Record for Railroad Appellees,
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Omaha, Nebraska.
BRYAN P. LEVERICH,
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A. U. MINER,
Attorneys for Railroad Appellees.

August, 1958.

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for railroad appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 18th day of August, 1958, I served, on behalf of all railroad appellees herein, copies of the foregoing document on the adverse parties herein, as follows:

1. On the Public Service Commission of Utah by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

E. R. Callister, Esq.
Attorney General of Utah
Salt Lake City, Utah

Keith Sohm, Esq.
Commerce Attorney for Utah Public Service Commission
State Capitol
Salt Lake City, Utah

2. On the Utah Citizens Rate Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Calvin L. Rampton, Esq.
721 Continental Bank Building
Salt Lake City, Utah

3. Also on the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Victor R. Hansen, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

A. Pratt Kesler, Esq.
United States Attorney for the District of Utah
Room 200 Federal Building
Salt Lake City, Utah

4. Also on the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Robert W. Ginnane, Esq.
General Counsel
Interstate Commerce Commission
Washington 25, D. C.

ELMER B. COLLINS,
Counsel of Record for Railroad Appellees.

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No. 15

IN THE

Supreme Court of the United States

October Term, 1958

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

APPELLANTS' REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1958

No. 15

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

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APPELLANTS' REPLY BRIEF

PRELIMINARY

In our original brief (p. 9) we noted that we had urged upon the court below, both on brief and oral argument, the contention that Congress had not empowered the Commission to allow railroads or their affiliates to institute unrestricted truck service by purchase of an existing motor operation. We then stated that "the opinion of the Court nowhere deals with the question." The appellee's response to this reference to the majority's failure to deal with our argument *in its opinion* is that a colloquy between Judge Van Oosterhout and counsel for the Commission, at the argument below, set forth at page 10 of our original brief, plus the fact that the

majority held the Commission's action was contrary to § 212 of the Interstate Commerce Act, "refutes this contention." Appellee's Brief, p. 20. We think it self-evident that a colloquy between a member of the court below and one of counsel at oral argument can hardly substitute for discussion, in the opinion, of the issues raised by other parties to the proceeding. We likewise think it self-evident that discussion of the Commission's power respecting amendment or revocation of properly issued certificates under § 212 can scarcely be substituted for a discussion of the contention we raised, i. e., that the Commission lacks the power, in the first instance, to issue an unrestricted certificate to a railroad or its affiliate through the medium of the purchase of an existing motor operation pursuant to § 5(2)(b) of the Act.

The Appellee's Brief Contains Serious Misstatements of Fact.

We hasten to add that had appellee's brief stopped there, however, this reply brief would not have been filed. It is only because appellee's brief, in its discussion of this phase of the case, contains several serious misstatements of fact that we feel the need to reply. The misstatements are contained in the last paragraph of page 20 of appellee's brief, which is repeated here for convenience:

> No answer to the argument of appellants in No. 15 and No. 16 would be complete without pointing out that this question was never presented to the Interstate Commerce Commission. In fact, there was not any intimation in any brief or argument before the Commission that the appellants in No. 15 challenged the Commission's power to issue the unrestricted certificates until their answer was filed in the District Court (R. 34). The appellants in No. 16 were not even parties before the Commission. Simple fairness would seem to dictate that the Commission should have been given an opportunity to express

its views upon such a question (cf. *United States* v. *Tucker Truck Lines* [1952], 344 U. S. 33, 37). While these appellants express grave concern over an alleged lack of notice with respect to the compliance orders, their concern does not extend to the rail-affiliated motor carriers holding unrestricted certificates which would be rendered valueless if their contentions in this case are upheld. Certainly the present contentions of these appellants constitute a collateral attack upon many certificates, of which attack the rail-affiliated certificate holders were never advised while this case was pending before the Commission.

Boiled down, appellee's argument is that these appellants waited until this proceeding reached the District Court to raise the contention that the Commission lacks power, in a §5 case, to authorize a railroad or its affiliate to conduct unrestricted truck operations, completely uncoordinated with those of the railroad. In addition, it makes the equally flat assertion that the appellants in No. 16 (the rail labor unions) "were not even parties before the Commission." Both assertions are contrary to the facts. Treating the latter first, it should be enough to note that the report of Examiner Waters, made a part of the record by Frisco (R. 73), referred to at page 9 of appellee's brief and printed here, contains the statement: "The Railway Labor Executives' Association was permitted to intervene in these proceedings by the division's order of November 21, 1944." R. 199.[1]

The Motor Carrier Appellants Contended Before The Commission That it Lacked Power to Issue Unrestricted Certificates to a Railroad or its Affiliate.

Here again, appellee's bald assertion is without foundation. As long ago as April, 1945, in a reply brief

[1] Although these appellants are not affected by this particular misstatement, we call it to the Court's attention as an accommodation to, and at the request of, the appellants in No. 16.

filed by the Regular Common Carrier Conference of American Trucking Associations[2] to Frisco's exceptions to the report of Examiner Waters already referred to, the same contention was made which appellee now quite mistakenly says was not raised until the case reached the District Court.[3] In order to refresh Frisco's recollection, and to set the record straight, we quote verbatim (from pp. 9-10) the portion of the brief dealing with the requirements of §5(2)(b):

> The source of the erroneous thinking of Frisco must be in a complete misreading and misunderstanding of the proviso contained in section 5(2)(b) of the act. That proviso prohibits the Commission from approving the acquisition of a motor carrier by a rail carrier unless the Commission specifically finds, among other things, that the transaction will enable the rail carrier to use the motor carrier service to public advantage in *its railroad* operations and will not unduly restrain competition. If that means anything at all, and it must mean exactly what it says, it is that the only circumstance or condition under which a railroad is allowed to acquire a motor carrier at all is one in which the motor carrier may be

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[2] One of the appellants in this case. Jurisdictional Statement, p. 1; Notice of Appeal, R. 187.

[3] The District Court set brief dates, as follows: Frisco was given 15 days to file its brief; defendants and interveners were given 30 days thereafter to file their briefs; Frisco was given an additional 15 days to file a reply brief. R. 161. These appellants raised the question of the Commission's lack of power to issue unrestricted certicates to railroads or their affiliates in our answer to Frisco's complaint (R. 34), and on oral argument (R. 146-148), which Frisco both opened and closed (R. 98, 155). Despite this, Frisco waited until it filed its reply brief in the District Court before it made its contention that we had raised the question too late. Thus Frisco effectively put it beyond these appellants' power to respond to their argument before the District Court. In this Court, Frisco failed to make its contention in its Motion to Affirm, as required by Rule 16(1)(b). Instead, it devoted almost two pages of its brief to a discussion, on the merits, of the question we presented. Motion of Appellee to Affirm, pp. 16-18.

of help to the railroad in the railroad's movement of rail freight, as an adjunct or incident to the rail freight service. It certainly cannot mean that a railroad can acquire an independent motor carrier and thereafter have the motor carrier continue to be independent and competitive. If that were true, the proviso to section 5(2)(b) placed deliberately in the act to prevent just that, would be deprived of all meaning and effect. What the Congress sought to accomplish by the proviso is clearly set forth in the statements of Senator Wheeler and Representative Sadowski on the floors of the Senate and House, respectively. Senator Wheeler said (79 Cong. Rec. 5655):

> "With this limitation, it will be possible for the Commission to allow acquisitions which will make for coordinated or more economical service and at the same time to protect the public against the monopolization of highway carriage by rail, express, or other interests."

Representative Sadowski said (79 Cong. Rec. 12206):

> "I will say in this respect that it is the intent, and it is important to the welfare and progress of the motor carrier industry that the acquisition of control of the carriers be regulated by the Commission so that the control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of other competing transportation."

From this it is quite clear that unless the motor carrier service of a railroad is to be in fact an adjunct of and an incident to the rail service itself, the railroad cannot acquire it. Certainly that is the clear import of every important Commission decision on the subject since the *Barker* case (1 M.C.C. 101) wherein the reasons for the statutory language and its treatment by the Commission in administration are stated in the following excerpt from the report:

"While we have no doubt that the railroad could, with the resources at its command, expand and improve the partnership service and that, so far as numbers are concerned, there is now an ample supply of independent operators in the territory for the furnishing of competitive service, we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of 213, above quoted, is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public."

The provision itself is merely a further step in pursuance of the established and well-recognized legislative policy of this country for many years to prevent the domination of one form of transportation by another competing form. That policy was expressed as long ago as 1912 in the Panama Canal Act, in 1914 in the Clayton Act, in 1935 in the Motor Carrier Act, and in 1938 in the Civil Aeronautics Act. It is too firmly rooted in our law to be casually by-passed or ignored, as Frisco apparently wishes done.

The quoted portion of the brief filed before the Commission in 1945 makes it clear that these appellants have contended all along that the Commission lacks power, under § 5, to authorize railroads or their affiliates to

perform unrestricted truck service, and that this contention was made before the Commission, as well as the District Court and this Court. It will thus be seen that Frisco's broad allegation that "there was not any intimation in any brief or argument before the Commission that the appellants in No. 15 challenged the Commission's power to issue the unrestricted certificates until their answer was filed in the District Court" is entirely without foundation. From this it follows that their contention that our argument respecting the Commission's lack of power constitutes a "collateral attack" upon "many certificates" held by rail affiliates is completely invalid.[4] We can readily understand, in view of the long span of time, the likelihood that the brief referred to has been lost or misplaced in Frisco's files. But then, as now, such briefs were filed in the Commission's public docket, and we submit that Frisco should have at least checked there before making its unfounded charge.

The fact that even today, more than a decade after its lack of power was urged in the very proceeding which led to this appeal, the Commission continues to ignore the specific statutory language limiting its power in § 5 cases, is reason enough for this Court to finally settle the question in this proceeding, as suggested in our original brief here (pp. 7-12). Reinforcing this need is the inconsistency of the Commission's decisions. In *Baltimore & Annapolis R. Co.—Purchase—Bison Lines, Inc.*, 60 M.C.C. 509, the Commission, division 4, denied a railroad's application to purchase the operating rights and certain property of a bus company. We submit that the basis for the denial set forth in the report in that

[4] Of course, only four of Frisco's certificates, and no others, whether held by it or any other railroad, are involved here. This was specifically stated by Frisco's counsel in argument before the District Court. R. 100.

case (decided October 4, 1954) represents the proper interpretation of the proviso of §5(2)(b) in cases of this kind. The report states (p. 518):

> Under the proviso of section 5(2)(b), we are required to find, before the railroad may be authorized to acquire vendor's motorbus operations, that it will be enabled to use that motorbus service to public advantage in its rail operations. Compare *Cincinnati, N. & C. Ry. Co.—Control—Lehigh Valley Transit*, 57 M.C.C. 41. See also *New England Transp. Co.—Control—Short Line, Inc.*, 60 M.C.C. 453, and *Chicago Aurora and E. Ry. Co.—Control—Tri-State Warehousing*, 60 M.C.C. 498. Applicants' argument that the vendee's rail operations are but a small part of its overall operations, and that there is no possibility of any restraint of competition as the railroad has no passenger operations, does not alter the unambiguous language of the statute that it must present evidence to support the required findings. No such evidence was submitted by vendee, nor is it apparent on this record how the statutory requirement can be met by applicant vendee, in view of the location of the railroad, the nature of the service which it renders, and the location of the motorbus properties which it seeks to acquire. We appreciate the practical operating and service aspects of the problem presented, and it appears unlikely that the proviso of section 5(2)(b) was directed at the factual situation here; but the statute makes no exception, and any hardships that may result from applying the law as written are properly for consideration by the Congress rather than by us.

Of course, if the Commission had consistently adhered to the mandate of the proviso of §5(2)(b), as in the cited case, in its decisions involving rail purchase applications, no problem would have arisen. But, as pointed out in our original brief (pp. 10-11), this is not the case. The resulting situation strongly emphasizes the need for this

Court's definitive opinion on this phase of this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 7th day of October, 1958, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Wayne H. Bigler, Esq., Assistant United States Attorney, U. S. Court House, St. Louis, Mo., and with postage prepaid, to The Solicitor General and Maurice A. Fitzgerald, Esq., Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert Ginnane, Esq., its General Counsel, and C. H. Johns, Jr., Esq., Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Frisco Transportation Company, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to its attorneys Ernest D. Grinnell, John E. McCullough, James L. Homire, and Alvin J. Baumann, Esqs., 300 Frisco Bldg., 906 Olive Street, St. Louis, Mo., and with postage prepaid, to Bernard G. Ostmann, Esq., Transportation Bldg., Washington 6, D. C.

4. On the Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, and Order of Railway Conductors and Brakemen of America, intervening defendants, by mailing a copy in a duly addressed envelope, with postage prepaid, to James L. Highsaw, Jr., their attorney, at 620 Tower Bldg., Washington, D. C.

PETER T. BEARDSLEY

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957

No. 15

AMERICAN TRUCKING ASSOCIATIONS, Inc., et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 16

RAILWAY LABOR EXECUTIVES' ASSOCIATION et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 19

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

On Appeal from the United States District Court for the Eastern Judicial District of Missouri, Eastern Division.

MOTION OF APPELLEE TO AFFIRM.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 636.

AMERICAN TRUCKING ASSOCIATIONS, Inc., et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 637.

RAILWAY LABOR EXECUTIVES' ASSOCIATION et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 651.

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

On Appeal from the United States District Court for the Eastern Judicial District of Missouri, Eastern Division.

MOTION OF APPELLEE TO AFFIRM.

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of the Supreme Court of the United States, Appellee Frisco Transportation Company moves the Court to affirm the judgment sought to be reversed by the above numbered appeals on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

JURISDICTION.

The jurisdictional requisites are adequately set forth in each of the jurisdictional statements.

STATUTES INVOLVED.

The pertinent provisions of the Interstate Commerce Act (49 U. S. C., Section 1 et seq.) are set forth in the appendices to the jurisdictional statements.

BRIEF IN SUPPORT OF THE MOTION.

STATEMENT.

By its opinion, which is reported at 153 F. Supp. 572, the District Court found that an order of the Interstate Commerce Commission entered December 7, 1953, in **Frisco Transportation Company Extension—Joplin—Miami**, 62 M. C. C. 367, should be enjoined in part. The Commission's order revoked and cancelled certificates of public convenience and necessity covering four separate parts (segments) of appellee's motor carrier operation upon the ground that those certificates had been "inadvertently issued" and ordered the issuance of new or amended certificates containing five restrictive conditions.[1] The District Court found that the Commission's action was contrary to Section 212 (a) of the Interstate Commerce Act [49 U. S. C. 312 (a)] under the decision in **Watson Bros. Transportation Co. v. U. S.** (1956), 132 F. Supp. 905, aff. 350 U. S. 927, and that the Commission's finding that the

[1] The conditions imposed by the Commission (l. c. 62 M. C. C. 383) were similar to those considered in U. S. v. Rock Island Motor Transit (1951), 340 U. S. 419. The Commission's order also found that the five conditions should be added to a fifth certificate, which action was affirmed by the District Court.

certificates in question had been "inadvertently issued" was without adequate support in the evidence. The District Court's opinion and its findings of fact and conclusions of law and the Commission's report are reprinted in the appendices to the jurisdictional statements.

Before the Commission and the District Court, appellants and appellee have disagreed as to the legally significant facts in this case. We therefore deem it appropriate to fully state the case so that our position, as well as the opinion of the District Court, may be clearly understood.

Appellee's Operations and the Portions Here Involved.

Appellee, a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, operates a motor common carrier service (so-called "all-out" service, i. e., the transportation of general commodities for the public at motor carrier rates on motor carrier billing) over approximately 2,700 miles in the States of Missouri, Kansas, Oklahoma, Texas, Arkansas, Tennessee, and Mississippi, its principal routes extending from St. Louis, Missouri, through Springfield, Missouri, to Oklahoma City, Oklahoma, and to Dallas, Texas, and from Kansas City, Missouri, through Springfield, Missouri, to Memphis, Tennessee, and beyond to Columbus, Mississippi. In addition, it operates a route from St. Louis, Missouri, through Cape Girardeau, Missouri, to Blytheville, Arkansas, which is restricted to the handling of freight in substitute service for its parent Railway Company.

The greater part of appellee's motor carrier system was acquired by the purchase of existing operating rights and physical properties of independent motor carriers pursuant to Section 213 [now Section 5 (2) (b)] of the Interstate Commerce Act. All of these acquisitions were

authorized by the Commission after hearing. The proceedings before the Commission which are the subject of this appeal involved six such segments of appellee's over-all operations, 284 miles in all, but which are so situated that, if restricted as proposed, the value of the balance would be seriously impaired, if not destroyed. Throughout the proceedings before the Commission these segments were referred to by their respective Commission docket numbers which, because of their similarity, are not ideal for descriptive purposes. The District Court referred to these segments by the name of the vendor from whom purchase was authorized and described the segments as follows:

> "• • • These are the 'Cooper' route from Joplin, Missouri, to Carthage, Missouri; the 'Hamm' route from Joplin, Missouri, to Miami, Oklahoma; the 'Tolson' route from Walnut Ridge, Arkansas, to Memphis, Tennessee; the 'Parker' route from Blytheville, Arkansas, to Memphis, Tennessee; the 'Rose' route from Hugo, Oklahoma, to Paris, Texas, and the 'Bennett' route from Blytheville, Arkansas, to Lake City, Arkansas. In its reconsideration of the 'Rose' certificate the Commission ordered no change. The operating certificate for the 'Bennett' route was issued in 1940 with the recital of a reservation of power to impose additional restrictions on the scope of activites permitted under the certificate, and hence, under the rule of United States v. Rock Island Motor Transit Co., 340 U. S. 419, 71 S. Ct. 382, 95 L. Ed. 391, rehearing denied 341 U. S. 906, 71 S. Ct. 609, 95 L. Ed. 1344, there can be little question of the power of the Commission to impose the restrictions which it has incorporated in the amended Bennett certificate" (l. c. 153 F. Supp. 574).

Since neither the Commission nor the District Court ordered any change in the "Rose" certificate, it is not involved in this appeal; and since the appellee has raised no

objection to the holding of the District Court that the Commission's findings and order in connection with the "Bennett" certificate were proper,[2] this appeal involves only the "Cooper," "Hamm," "Parker," and "Tolson" certificates.

History of These Proceedings.

During the years 1938 and 1939, appellee filed applications to purchase the motor carrier operating rights and properties of "Cooper," "Hamm," "Parker" and "Tolson." After finance hearings were held, examiner's proposed reports were issued in connection with each of these applications, which reports approved the purchase by appellee of the operating rights and properties of these motor carriers and concluded with the following language:

> "[We find that the purchase by appellee of the operating rights and property of Hamm, Cooper, Parker and Tolson upon the terms and conditions set forth in the applications] which terms and conditions are found to be just and reasonable, will be consistent with the public interest, will promote the public interest by enabling the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, trustees) to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition, and that the conditions of section 213 have been or will be fulfilled; provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said railway company, and shall not unduly restrain competition."

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[2] See the District Court's conclusion of law No. 4, reprinted in the appendices to the jurisdictional statements.

Division 5 of the Interstate Commerce Commission approved and adopted the reports of the hearing examiners, with one commissioner dissenting in each case (Hamm, 15 M. C. C. 320; Cooper, 15 M. C. C. 317; Parker, 25 M. C. C. 96; Tolson, 25 M. C. C. 96).

Following this action by Division 5 of the Commission, appellee completed the purchases, and operations of the same nature as those conducted by appellee's predecessors in interest were commenced by appellee in early 1939, and have continued without change as to the nature of such operations and without interruption to the present time.

On various dates in 1939[3] the Commission issued orders commonly referred to as "compliance orders" in connection with the "Cooper", "Hamm", "Parker" and "Tolson" purchases which authorized and directed the issuance to appellee of certificates of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle covering operating authority previously applied for by "Cooper", "Hamm", "Parker" and "Tolson". These orders provided for the issuance of certificates **with no restrictions as to the type of motor common carrier service.** The compliance order in the "Hamm purchase" is reproduced in its entirety in Appendix 1. The others contain identical language except as to the description of the operating authority.

On March 31, 1942, in the cases of "Cooper" and "Hamm" and on April 14, 1942, in the cases of "Parker" and "Tolson," the Commission granted to appellee certificates of public convenience and necessity which included *inter alia* the operating rights purchased from these four vendors, which certificates contained no restrictions as to

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[3] "Cooper" purchase March 11, 1939; "Hamm" purchase March 14, 1939; "Parker" purchase June 16, 1939; and "Tolson" purchase July 10, 1939.

the type of motor common carrier service authorized thereunder.

In July, 1941, prior to the issuance of the certificates of public convenience and necessity in the "Cooper", "Parker", "Hamm" and "Tolson" purchases, competing motor carriers filed a complaint with the Commission, alleging that appellee was operating a motor carrier service independent of its parent railroad's rail service and in contravention of the condition imposed by the Commission in the finance hearings. After appropriate proceedings, the Commission concluded in 1946 that appellee was not operating in violation of the terms of its certificates. **(Campbell Sixty-Six Express, Inc., et al. v. Frisco Transportation Company,** 46 M. C. C. 222.) The Commission's opinion indicated that the ruling should not be taken as sanctioning such operation since the proceedings pursuant to which the "Hamm", "Cooper", "Parker" and "Tolson" certificates were issued to appellee had been reopened for further hearing by Division 5 in accordance with its report, 43 M. C. C. 641, which the Commission was reversing. This reopening order which was entered on January 4, 1945, began the proceedings which give rise to this appeal. It reopened for reconsideration the proceedings by which appellee acquired the six segments above described.

The order of January 4, 1945, provided that an examiner's proposed report should be served on the parties and that if any party desired a further hearing a petition for such hearing should be filed with the Commission. No petition for hearing was filed by anyone until after Examiner David Waters filed a proposed report on reconsideration on February 8, 1945. That report recommended that the Commission should find that a reservation had been "inadvertently" omitted from certain of appellee's certificates described above and should therefore impose restrictions on appellee's operations substantially the same

as those in the order of December 7, 1953 (the order which the District Court has enjoined in part). Appellee filed exceptions to this proposed report on March 29, 1945, including therein a motion to rescind the order of January 4, 1945, and discontinue the proceedings.

After the filing of those exceptions, another reopening order was issued by the Commission on May 28, 1945, this time for further hearing. Since that time Examiner Waters' proposed report has been disregarded, although never officially rescinded. By an order issued on March 8, 1946, the Commission set all of the reopened proceedings for hearing before an examiner on April 8, 1946, at Kansas City, Missouri. A transcript of that hearing is part of the record in this case.

At that hearing appellee renewed its motion to discontinue the proceedings and offered two witnesses for the purpose of proving certain matters in connection with that motion. Over appellee's protest, the examiner required appellee to furnish two other witnesses, one of whom was an employee of appellee and the other an employee of its parent Railway Company. Throughout the hearing appellee had a continuing objection to any testimony by the two witnesses which it produced involuntarily.

The evidence taken at this Kansas City hearing constitutes all of the evidence taken at any time by the Commission in connection with the reopened proceedings. No evidence was offered either by the Commission, or any other person, nor was any other hearing ever held.

Suffice it to say that the two witnesses offered by appellee in support of its motion to discontinue the proceedings were an auditor for appellee, who testified concerning the financial status of appellee, and appellee's assistant general manager who offered testimony accompanied by documents to show that the certificates were

issued in the form intended by the Commission (including, *inter alia*, the compliance orders). One witness who was produced at the request of the Examiner and over appellee's objection, testified concerning the rail merchandise operations of the St. Louis-San Francisco Railway Company, and the other witness, produced over appellee's objection, testified concerning the operations of appellee.

On May 17, 1948, a Recommended Report and Order on Further Hearing was filed by Examiners William T. Croft and Beverley S. Simms (the latter not present at the Kansas City hearing). This report recommended that the Commission find that appellee's certificates above-described (except Bennett) were inadvertently issued and that those certificates (except Rose) should be revoked and new or amended certificates issued which would restrict the previously unrestricted operations of appellee over the four remaining segments. The recommended restrictions were, with minor exceptions, the same as those in the report and order of December 7, 1953.

Exceptions to this report were duly filed by appellee on August 28, 1948, and subsequently on October 22, 1951, Division 5 of the Commission issued its Report on Further Hearing (53 M. C. C. 415). This report differed from the report of the Examiners, but upheld its recommended findings with no material change.

On February 1, 1952, appellee filed its petition for reconsideration of the report of Division 5, and on July 7, 1952, the Commission reopened the proceedings for oral argument, which was held on November 19, 1952.

After the oral argument the Commission modified the report of Division 5 by its report dated December 7, 1953, with four Commissioners dissenting and one not participating. The modifications did not affect the findings or change the limitations and restrictions placed upon appellee by the report and order of Division 5. The only

modifications were in language and in some of the reasoning used in reaching the findings (62 M. C. C. 367).

On February 2, 1954, appellee filed its petition for reconsideration of the Commission's report and order, which petition was denied by the Commission's order dated April 4, 1955.

On May 20, 1955, suit was brought under Sections 1336, 1398, 2284 and 2321-2325 of the Judicial Code (28 U. S. C. 1336, 1398, 2284, 2321-2325), in the District Court to set aside the order of December 7, 1953.

After the filing of the complaint, the Interstate Commerce Commission intervened as a defendant without objection by appellee. Various truck lines and associations (the appellants in Nos. 636 and 637) sought leave to intervene as defendants and were granted the right to intervene over appellee's objection after oral argument on the question. The intervening defendants filed answers and defendants United States of America and Interstate Commerce Commission were required on motion of appellee to file amended answers.

The District Court, with one judge dissenting, found, as noted above, that the Commission's order should be enjoined as it applied to the "Cooper," "Hamm," "Parker" and "Tolson" certificates. Two basic reasons, which are best stated in the language of the District Court, were advanced for this ruling:

> "Under the Watson Bros. decision, the action of the Commission is an attempt made contrary to Section 212 to revoke and change a certificate duly issued, and is more than the mere correction of a clerical error.
>
> • • • • • • • •
>
> "In the instant case the four orders last referred to are without adequate support in the evidence" (l. c. 153 F. Supp. 577).

In the findings of fact and conclusions of law filed subsequent to the District Court's memorandum opinion, these reasons were stated as follows (Conclusions of Law 7, 9, 15, 16 and 17):

"7. Motor carrier certificates duly issued cannot be modified in the manner in which plaintiff's certificates in this case were sought to be modified by the Commission, even though some prior report indicates the contrary. **Watson Brothers Transportation Company v. U. S.**, 135 F. S. 905 (affirmed 350 U. S. 927).

"9. The action taken by the Commission in cancelling the Hamm, Cooper, Parker and Tolson certificates on the ground that said certificates were 'inadvertently issued,' is an attempt made contrary to Section 212 of the Interstate Commerce Act to revoke or change a certificate duly issued, and is more than the mere correction of a clerical error.

"15. The Commission's order of December 7, 1953, as it applies to plaintiff's certificates bearing numbers MC 89913, Sub No. 1; MC 89913, Sub No. 3; MC 89913, Sub No. 5, and MC 89913, Sub No. 6, should be enjoined, set aside, suspended and annulled, because said order is contrary to the provisions of Section 212 (a) of the Interstate Commerce Act, 49 U. S. C. A., Section 312 (a).

"16. In addition, because the Commission's finding that said certificates were issued as a result of clerical error is without the support of adequate evidence, the order of December 7, 1953, as it applies to the certificates described in conclusion of law 15, should be enjoined, set aside, suspended and annulled.

"17. Either of the reasons stated in conclusions of law 15 or 16 would be sufficient in and of itself to require that the order be enjoined, set aside, suspended and annulled."

On August 12, 1957, the District Court entered judgment enjoining the enforcement of the Commission's order of December 7, 1953, as that order applied to the "Hamm", "Cooper", "Parker" and "Tolson" certificates, and affirming the order as it applied to the "Bennett" certificate.

Three separate appeals from this judgment have been filed: (1) by a trucking association and six independent motor carriers (No. 636), (2) the railway labor unions (No. 637), and (3) the Interstate Commerce Commission (No. 651). The United States of America, a defendant below, did not appeal.

ARGUMENT.

Not one of the eight questions presented in the three jurisdictional statements is substantial, nor does anything stated by appellants establish that the District Court erred in reaching either of its basic conclusions.

Throughout the handling of this case before the Interstate Commerce Commission and the District Court there was a constant attempt by the parties who opposed appellee to raise and try collateral issues based upon warped constructions of the facts and upon a complete disregard of the record. Before the Commission appellee's opponents achieved a measure of success, but the District Court refused to be persuaded by irrelevancies and decided the case upon the basic and controlling issues, both of which are in full accord with decisions of this Court and the applicable statutes. Neither of the District Court's rulings raises any question which is sufficiently substantial to warrant further argument.

By its opinion the District Court has obviated the necessity of any consideration of the many questions and issues now raised by appellants. The opinion of the District Court clearly demonstrates that, even if its reliance upon **Watson** were not warranted, there remains a defect in the Commission's order which a decision on any collateral issue could not cure, for the District Court held that the order of the Commission as it applied to the "Cooper," "Parker," "Hamm" and "Tolson" certificates was without adequate support in the evidence. In fact, a detailed review of the evidence led the District Court to say:

> "While, as set out above, under the Watson Bros. case we are of the opinion that the four certificates cannot be canceled as a result of the hearing conducted by the Commission since it was not conducted under Sec. 212 of the Act, yet, if we agreed with the

dissenting opinion in the Watson Bros. case, we would still be of the opinion in this case that the four certificates in question could not be canceled and reissued because no clerical error in fact existed" (l. c. 153 F. Supp. 578).

I.

The Questions Raised in No. 636 Are Not Substantial.

Perhaps the most significant comment that can be made about the first question raised by the appellants in No. 636, viz., whether the District Court erred in holding that the certificates in question were not issued as a result of clerical error, is that no consideration is given by these appellants to Section 212 (a) of the Interstate Commerce Act, the statutory basis of the District Court's decision. These appellants apparently prefer to ignore this statutory basis because it is obvious that if the strict requirements of Section 212 (a) are relaxed, no motor carrier will have any assurance that its certificates will not be revoked upon findings as violative of Section 212 (a) as the findings made by the Commission in this case.

The District Court found that the Commission's finding that the certificates in question were "inadvertently issued" was "without adequate support in the evidence" and expressed the opinion that the evidence compelled the opposite conclusion. In raising their first question these appellants would apparently sweep aside the standard requirement of adequate evidentiary support and substitute therefor speculations and assumptions because they point to nothing in the record which demonstrates any error of the District Court.

The appellants' attempt to distinguish the **Watson** case upon the ground that only lack of notice was the basis of the District Court's opinion and this Court's affirmance is fully answered by the opinion of the District Court here

in its analysis of the dissenting opinion in the **Watson** case (l. c. 153 F. Supp. 576). As noted by the District Court, "the arguments advanced here for the defense are the arguments of the minority opinion in the Watson Bros. case" (l. c. 153 F. Supp. 578). Appellants' further attempt to distinguish **Watson** upon the ground that it involved an independent motor carrier as opposed to a rail-affiliated motor carrier such as appellee herein, rests upon an irrelevancy and is without foundation in Section 212 (a) of the Interstate Commerce Act.

Secondly, appellants in No. 636, upon the assumption that no notice of the Commission's intention to issue unrestricted certificates to appellee was ever given to anyone, question whether the Commission could have validly issued the certificates in question without affording motor carrier protestants who were parties to the antecedent finance proceedings, notice and opportunity to protest. The contention that this presents a substantial question ignores the issuance of the "compliance orders."[4]

A "compliance order" was a standard type of order generally in use in claimed grandfather cases under Section 206 at the time of appellee's original purchases, which provided that upon compliance by applicant, or a successor in interest, with the provisions of Sections 215, 216 and 217, and with the rules and regulations issued under such sections, "a certificate of public convenience and necessity shall be issued" to applicant. Such orders set forth in detail the commodities the applicant was authorized to carry, the routes over which it was authorized to carry the same, and any limitations or restrictions upon the service it was authorized to render and were, under Commission's standard practice, served upon all parties to the proceeding.

If any interested party considered the "compliance order" to be in any respect incorrect, the standard practice

[4] The "Hamm" compliance order is reproduced in Appendix 1.

was for that party to file a protest. See **Crescent Express Lines v. United States** (1943), 320 U. S. 401, 403. After a reasonable time, in the absence of protest from anyone, the certificate was issued.

It will thus be seen that the standard practice (followed here) provided for the very type of notice which appellants now claim was denied in this case. The record in this case may be searched in vain for any indication either that the appellants in No. 636, or any of them, were parties to the original finance proceedings, or that any of such parties failed to receive notice of the Commission's intention to issue unrestricted certificates as revealed by the compliance orders. In fact, the filing of the complaint in **Campbell Sixty-Six Express, Inc., v. Frisco Transportation Company**, 46 M. C. C. 222, in 1941, prior to the issuance of the certificates in question, completely negatives the notion that interested parties did not receive notice.

Finally, the appellants in No. 636 question the power of the Commission in any case to authorize the performance of an unrestricted motor vehicle operation by a rail-affiliated motor carrier through the purchase of certificates of independent motor carriers. Appellants allege that the decision of the District Court has the effect of ignoring Section 5 (2) (b) of the Interstate Commerce Act (formerly Section 213). This argument is based upon the construction of Section 5 (2) (b), that said section, without exception, requires the insertion of conditions in the certificate of a rail-affiliated motor carrier. A similar contention by the American Trucking Associations, Inc., in connection with the application of a rail-affiliated motor carrier for a certificate under Section 207 of the Interstate Commerce Act was recently rejected by this Court in **American Trucking Associations, Inc., v. United States of America**, Nos. 6 and 8, October Term, 1957, decided December 9, 1957.

It is also clear upon this record that the Interstate Commerce Commission does not share the opinion of the appellants that Section 5 (2) (b) of the Interstate Commerce Act must be so construed. In the argument before the District Court, Judge Van Oosterhout raised this specific question during the argument of counsel for the Interstate Commerce Commission.

> "Judge Van Oosterhout: Of course, in a particular case, the Commission would have had power if the record justified it to issue an unrestricted certificate?
>
> Mr. Johns: Now, we say yes; the ATA says no. We have a case in the Supreme Court today arguing that very point, that we may not grant an unrestricted certificate under any circumstances.
>
> Judge Van Oosterhout: At least the Commission thinks they have the power to do that?
>
> Mr. Johns: Yes, sir, in an unusual case.
>
> Judge Van Oosterhout: So it would be, in other words, the type of certificate here would have been the type of certificate that would have been within the power of the Commission to issue; it is just a question whether the proper findings were made?
>
> Mr. Johns: Proper findings were made. Yes, sir, if proper findings were made we think we could have issued the certificate. It would have to be based on evidence, of course, showing some good reason * * *" (Transcript of Argument below, June 19, 1956, pp. 129-130).

The Commission's action in this case with respect to the "Rose" certificate also negates such a construction of the statute as does its issuance of many other "unrestricted" certificates to appellee. See **Frisco Transportation Company—Purchase—C. F. Reddish** (February 5, 1940), 35 M. C. C. 132, which opinion also embraces **Frisco Transportation Company—Purchase—Mrs. B. T. Blake; Frisco Transportation Company—Purchase—Ozark Truck Lines,**

Inc. (March 18, 1940) 35 M. C. C. 255; **Frisco Transportation Company—Purchase—William B. Mayers** (December 31, 1942), 38 M. C. C. 820; **Frisco Transportation Company—Purchase—Keystone Freight Lines** (March 2, 1943), 39 M. C. C. 802; **Frisco Transportation Company—Purchase—Powell Bros. Truck Lines, Inc.** (July 10, 1943), 39 M. C. C. 809; **Frisco Transportation Company—Purchase—Luper Transportation Company** (August 24, 1943), 39 M. C. C. 813.

II.

The Questions Raised in No. 637 Are Not Substantial.

The Railway Labor Executives' Association and two railway labor unions, appellants in No. 637, raise three questions. The first deals with the authority of the Interstate Commerce Commission to impose conditions on the certificates of a rail-affiliated motor carrier for the purpose of insuring that the operations of such carrier are auxiliary to and supplemental of the train service of the parent railroad under four circumstances. It requires but a cursory reading of the opinion of the District Court to determine that many of the circumstances which were the basis of the District Court's opinion have been ignored by the appellants.

The circumstances outlined by the appellants do not include the issuance by the Commission of compliance orders which did not contain any limitation as to the type of service to be rendered by appellee. Nor do appellants consider that during the same period, i. e., between the issuance of the underlying finance reports (1939) and the certificates (1942), a certificate covering the Bennett route was issued (1940), in which the Commission reserved the right to further restrict, and that there was pending before the Commission at the time of the issuance of the certificate a complaint proceeding (the **Campbell Case**, supra), instituted by competing motor carriers alleging that the

reservation recited in the finance proceedings was applicable and the appellee was operating contrary to those conditions. As previously stated, this complaint was dismissed by the Commission in 1946 (46 M. C. C. 222). It is obvious therefore that question No. 1 presented by the appellants in No. 637 has little or no meaning in light of the relevant facts of this case.

Secondly, these appellants raise the question of whether or not under the circumstances enumerated in their question No. 1, the Commission has authority to impose conditions upon the certificates (which they assert were *ultra vires* of the Commission without such conditions) of a rail-affiliated motor carrier upon a finding that certificates not containing those conditions were inadvertently issued. We have shown that the Commission does not share the view that the unrestricted certificates were beyond its power. The District Court has found that under the decision in **Watson** the Commission's action in this case was an attempt made contrary to Section 212 (a) to revoke or change a certificate duly issued and was more than a mere correction of a clerical error. In so holding, the District Court did not in any way depart from the decisions in this Court; and in fact, as the District Court notes, the present case upon its facts presents a much stronger case than did **Watson** for holding that the Commission acted contrary to Section 212 (a).

Castle v. Hayes Freight Lines (1954), 348 U. S. 61, 64-65, indicates the strict construction which must be placed upon Section 212 (a). This Court's affirmance of the District Court in the **Watson** case demonstrates that an alleged clerical error offers no reason for relaxing the requirements of that section. Clearly, then, the District Court properly held that under Section 212 (a) the Commission's order should be enjoined. In **United States v. Rock Island Motor Transit**, 340 U. S. 419, 448, cited so often by appellants, this Court said:

"As under the statute, §§ 206, 207, 208, motor carriers must have certificates authorizing their operations, we conclude that the certificate is the final act or order that validates the operation. Until its form and content are fixed by delivery to the applicant, the power to frame it in accordance with statutory directions persists."

Finally, appellants in No. 637 state that if their question No. 2 is answered in the affirmative, i. e., that the Commission has the power to impose conditions upon a finding that they were inadvertently omitted from the certificates, the further question is presented as to whether the evidence in support of the Commission's finding was adequate.

The District Court made a thorough and detailed examination of the record. In its finding of fact No. 22, it expressed the view of the facts that there was no evidence of record before the Commission which could be used as a basis for the finding that clerical error existed in the issuance of the certificates in question, and in its conclusion of law No. 16, the District Court concluded that the Commission's finding that the certificates were issued as a result of clerical error is without the support of adequate evidence.

There is literally no evidence in the record upon which a finding of inadvertence could be based. No employee of the Commission was called to describe the procedure followed in issuing the certificates. No evidence concerning the authority of any person engaged in the issuance of certificates was offered by the Commission.

The report of the Commission shows beyond question (l. c. 62 M. C. C. 375) that the Commission inferred the existence of "inadvertence" from two facts, viz., (1) appearance of a proviso in the finance report merely reserving a right to restrict the purchased operations in the

future if circumstances so required, and (2) its absence from the certificate issued several years later.

Such logic violates the rules set forth in the decision of this Court in **Pennsylvania Railroad v. Chamberlain** (1933), 288 U. S. 333. First, the two facts used by the Commission standing alone support the opposite but equally valid inference that the omission was intentional; and, second, uncontradicted evidence in the form of compliance orders (positive acts of the Commission) intervening between the finance reports and the issuance of the certificates ordering the issuance of unrestricted certificates prohibits the contrary inference that certificates were issued inadvertently.

The argument of these appellants in support of the substantial nature of the questions which they present asserts that the effect of the action of the District Court is to permit appellee to operate an "unrestricted motor carrier service totally unrelated to its parent railroad's operations" (Jur. St. No. 637, p. 20). Therefore, say appellants, the **Watson** case cannot be followed because to do so would validate an operation the Commission did not have the power to authorize. We have already noted that the Commission does not share this view of its power.

Furthermore, appellee's motor carrier system generally parallels the railroad system of its parent railroad not only as to the segments here involved, but as to all other segments.

In the "Cooper" and "Hamm" purchases the Commission said, "All points on vendor's route are also stations on the railway * * *" (l. c. 15 M. C. C. 318 and 15 M. C. C. 321). In the "Parker" and "Tolson" purchases it was phrased, "All principal points served by vendors are stations on the railroad, and others, while not directly served by the latter, are small towns not further removed from a station thereon than 10 miles" (l. c. 25 M. C. C. 99).

Appellants assert that the decision below is contrary to this Court's decision in the **Rock Island** case, 340 U. S. 419. That case determined that the Commission had the power to restrict the certificates of a rail-affiliated truck line **when the power to restrict is reserved in the certificate.** Here that power was not reserved; the certificates contain no such reservation.

The District Court recognized and followed the **Rock Island** holding in its action on the "Bennett" certificate. It also recognized and followed the **Watson** case in holding that the Commission's action on the "Cooper", "Hamm", "Parker" and "Tolson" certificates was contrary to Section 212 (a) which the **Rock Island** case recognizes as a bar to revocation of certificates except for willful failure to comply with the act or orders of the Commission (340 U. S. 435).

Appellants attempt to say that the following statement of this Court in **Rock Island** means that the present case has already been decided against appellee:

> "This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself." (l. c. 340 U. S. 445-446.)

It should be noted that appellants construe the phrase "order directing the issue of the certificate" to mean "orders approving transportation company's purchases." The actual fact is that the compliance orders, used by the District Court as a part of the basis of their conclusion in this case, were actually the "orders directing the issue of the certificates."

Appellants then argue that even if this quotation from the **Rock Island** case does not constitute approval of the

Commission's action in this case, it leaves the question open for decision by this Court. We have already noted in connection with the third question presented in No. 636 that the Commission has never held that it did not have the power to issue unrestricted certificates to a rail-affiliated motor carrier. The question of that power is not properly presented for decision in these appeals because neither of the two bases of the opinion of the District Court necessitated any consideration of that question to finally determine this case.

These appellants would have the Court believe that the decision below deprives the Commission of its power, after notice and hearing, to enforce statutory requirements by correcting inadvertent errors. The opinion of the District Court and its findings of fact and conclusions of law do not hold that the Commission has no power to correct clerical errors. The District Court in this case limited its findings and conclusions to the facts presented by this case and holds that under **Watson** the action of the Commission is an attempt made contrary to Section 212 (a) to revoke and change a certificate and that the action of the Commission in this case is more than the mere correction of a clerical error. This obviously is the reason why the District Court examined the evidence in such detail and limited its opinion to the holding that the Commission's action here was more than a correction of a clerical error.

Appellants assert that this Court has recognized the Commission's power "to correct or revoke a certificate erroneously issued" citing **Riss & Co. v. United States**, 100 F. Supp. 468, 474, aff. 342 U. S. 937; and **United States v. Seatrain Lines**, 329 U. S. 424. Suffice it to say that the **Riss** case does not pass upon the Commission's power to revoke and correct a certificate on the ground of inadvertence. Furthermore, we submit that the **Seatrain** case and the **Watson** case demonstrate what has happened when the Commission purported to act upon the ground of inadvert-

ence. In both cases the courts found that the action of the Commission amounted to more than the correction of a clerical error.

III.

The Questions Raised in No. 651 Are Not Substantial.

The first question presented by the Interstate Commerce Commission, appellant in No. 651, is, for all practical purposes, the same as the first question presented by the appellants in No. 637. It deals with the power of the Commission to modify the certificates under certain circumstances. The Commission, rather than dealing with the exact circumstances, criticizes the District Court's opinion upon the ground that the power to correct a certificate (presumably it refers to one issued through alleged inadvertence) is "essential to the fulfillment of the objectives of the Interstate Commerce Act, and in fairness to private parties." (Jur. St. No. 651, p. 8.)

The Commission asserts that it

> "* * * has long held that, in the absence of unusual circumstances, motor carrier operations acquired by a railroad, or its affiliate must be restricted to service which is auxiliary and supplemental to the rail service." (Jur. St. No. 651, p. 8.)

In making this statement the Commission apparently chooses to overlook a statement made by it on December 23, 1943, more than a year after the certificates in question were issued, in **Pacific Motor Trucking Company—Purchase—Valley Motor Lines, Inc.**, 39 M. C. C. 441, 446-7, where, in passing upon the application of a rail-affiliated motor carrier to purchase the rights of an independent motor carrier, it said:

> "In **Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.**, 5 M. C. C. 9, herein called the **Barker case**, it was found that such a transaction could be

approved under that proviso when the evidence established that the motor-carrier operations proposed to be acquired could and would be used in service 'auxiliary or supplementary to train service' of the affiliated railroad. That principle has since been followed in appraising the evidence adduced to support the statutory finding in rail-motor acquisition cases. However, the meaning of the phrase 'auxiliary and supplementary to train service', as sometimes formerly used in acquisition cases has never been defined as to precisely what limitation of the operating authority was intended by those words. Evidence showing how such service could and would be rendered in various ways, if the transaction were approved, has been accepted and found sufficient to support the required statutory finding. Usually, such evidence has related to motor-carrier operations in combination and in coordination with the railroad's operations, resulting in expedited service, and savings for the railroad, but **no condition has heretofore been imposed in acquisition cases limiting the transportation authorized solely to transportation in combination with the railroad of the railroad's freight, or preventing the motor-carrier operations and service being made directly available to the shipping public apart from and in addition to the railroad's service.** The only definite restriction on the operating authority which was imposed in the **Barker case** and later cases has been designed to confine the motor-carrier operations acquired to the territory of the railroad through limiting the rights so as to authorize service only at stations on the railroad. Although, at times, a condition formerly was sometimes included in acquisition cases to the effect that service to be rendered should be 'auxiliary and supplementary' to the railroad's service, **there has been no indication in the reports that such condition was intended to prohibit rendition of all motor-carrier serv-**

> ice directly for the shipping public under the operating rights in addition to, in substitution for, and in lieu of, the parent railroad's service, or to restrict the operation solely to one in combination with the railroad's operation; nor is it our understanding that it has been so construed by the carriers. In other words, evidence upon which affirmative action has often been based, and the finding made that the resulting service would be auxiliary and supplementary to that of the railroad, has been based upon a motor-carrier operation in addition to, in substitution for, and in lieu of, the railroad's operation, as well as upon an operation in combination with the railroad. Southwestern Trans. Co.—Purchase—Hill and Howe, 37 M. C. C. 83, in which petition for reconsideration was denied by the Commission March 2, 1942." (Emphasis added.)

The attempt by the Commission to intimate that failure to include the restrictions in appellee's certificates would "revoke *pro tanto*" the requirements of Section 5 (2) (b) is also useless because the finance reports covering the "Cooper", "Hamm", "Parker" and "Tolson" purchases reveal that findings which completely comply with Section 5 (2) (b) (formerly Section 213) were made. See 15 M. C. C. 317, 319; 15 M. C. C. 320, 322; 25 M. C. C. 96, 100.

The Commission's assertion that fairness to competing carriers and other private parties requires that the Commission be empowered to correct clerical errors in a certificate is completely answered, we submit, by decision in **Watson** and by the decision of the District Court in this case, for it will be noted that the District Court has merely held that under **Watson** the Commission's action in this case is an attempt to revoke a certificate contrary to Section 212 (a) and is more than the mere correction of a clerical error. Nothing in the opinion of the District Court or in its findings can be construed as holding that the Commission may not correct clerical errors if they are truly "clerical" in character and if proper procedure is followed.

The Commission asserts that "Any suggestion that the Commission deliberately ordered the issuance of certificates inconsistent with the findings and conditions in its reports is without support in the record and impeaches the integrity of the Commission's reports as the necessary basis for its orders" (Jur. St. No. 651, pp. 12-13). We refer again to the compliance orders. The very language of the compliance orders and the certificates in these proceedings refutes the claim that their issuance was merely "a routine function performed by subordinate employees of the Commission and not reviewed by the entire Commission or by a Division" (Jur. St. No. 651, p. 12).

In **Ozark Truck Lines, Inc., Common Carrier Application**, 32 M. C. C. 459, which was decided on February 19, 1942, prior to the issuance of the certificates here in question, the Commission specifically commented upon the compliance orders entered in "Hamm" and "Cooper" and recognized that the compliance orders in those purchases were intended to direct the issuance of unrestricted certificates (l. c. 32 M. C. C. 460).

The second question presented by the Commission seeks a determination of whether the District Court erred in finding that the omission of the reservation from the certificate was a result of a change in the Commission's policy rather than of inadvertence or clerical error. The District Court's comment was "what the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such" (l. c. 153 F. Supp. 578). It is readily apparent that the Commission has misconstrued this comment by the District Court because, before so commenting, the Court had first held that the Commission's action was more than a mere correction of a clerical error and actually amounted to a revocation of a certificate contrary to the provisions of Section 212 (a) and that the

Commission's finding that the certificates were inadvertently issued was not supported by adequate evidence. That the District Court's comment obviously represents only its view of the Commission's purpose and is not the reason for its decision is plainly evident from the findings of fact and conclusions of law which set forth only two bases for the decision either of which, the District Court concluded, was sufficient to require that the order be enjoined. (See Conclusions of Law 15, 16, 17.)

It is noteworthy that the Commission apparently chooses to ignore its decision in **Smith Bros. Revocation of Certificate** (1942), 33 M. C. C. 465, 42 M. C. C. 211, where in passing upon its power under Section 212, the Commission said:

> "In our opinion, the language of [Section 212 (a)] is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding" (l. c. 33 M. C. C. 472).

This statement by the Commission was one of the authorities relied upon by the District Court in concluding that the action of the Commission in this case was more than a mere correction of a clerical error.

CONCLUSION.

For the reasons above stated, we submit that the opinion of the District Court should be affirmed since it is in full accord with the **Watson** case (132 F. Supp. 905, aff. 350 U. S. 905), the Rock Island case (340 U. S. 419), and the Seatrain case (329 U. S. 424) and the long line of decisions requiring that orders of the Commission be supported by adequate evidence. Either of the basic reasons advanced in that opinion for enjoining the order of the Commission in part is sufficient to require that the Commission's order be enjoined, and both of them are based upon a close examination of the record in this case and the decisions of this Court. Not one of the questions presented in the three jurisdictional statements offers any substantial reason why there should be further argument.

Respectfully submitted,

JAMES L. HOMIRE,
JOHN E. McCULLOUGH,
ALVIN J. BAUMANN,
ERNEST D. GRINNELL, JR.,
300 Frisco Building,
St. Louis 1, Missouri,
Attorneys for Appellee.

January 3, 1958.

Of Counsel:
BERNARD G. OSTMANN,
Attorney at Law,
Transportation Building,
Washington 6, D. C.

Certificate of Service.

I, Ernest D. Grinnell, Jr., one of the attorneys for appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 2nd

day of January, 1958, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with proper postage prepaid, to Wayne H. Bigler, Assistant United States Attorney, U. S. Court House, St. Louis, Mo., and to The Solicitor General and Maurice A. Fitzgerald, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with proper postage prepaid, to Robert Ginnane, its General Counsel, at the offices of the Commission, Washington 25, D. C., and to Charlie H. Johns, Jr., its Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the Railway Labor Executives' Assn. et al., by mailing copies in duly addressed envelopes, with proper postage prepaid, to James L. Highsaw, Jr., and Edward J. Hickey, Jr., 620 Tower Building, Washington, D. C., to Carroll J. Donohue, 506 Olive Street, St. Louis 1, Missouri, and to Clarence M. Mulholland, 741 National Bank Building, Toledo 4, Ohio.

4. On the American Trucking Associations, Inc., et al., by mailing copies in duly addressed envelopes, with proper postage prepaid, to Gregory M. Rebman and B. W. LaTourette, 1230 Boatmen's Bank Bldg., 314 North Broadway, St. Louis 2, Mo.; to Wentworth E. Griffin, 1012 Baltimore Street, Kansas City, Mo., and to Peter T. Beardsley, 1424 Sixteenth St., N. W., Washington 6, D. C.

Ernest D. Grinnell, Jr.

APPENDIX 1.

Order.

At a Session of the Interstate Commerce Commission, Division 5, Held at Its Office in Washington, D. C., on the 14th Day of March, A. D. 1939.

No. MC 89913 Sub 1*

Application of Frisco Transportation Company, a Corporation, St. Louis, Missouri.

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity to applicant's predecessor in interest upon compliance with the terms of said order; that the purchase of the operations herein involved having been approved and authorized, as provided in Section 213 of the Motor Carrier Act, 1935; and that further consideration having been had:

It further appearing, That applicant or predecessor in interest was on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification **set forth as appended on reverse side hereof or attached hereto** and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the Motor Car-

* This order embraces the authority applied for under Docket No. MC 29652, John Hamm, d/b/a Southwest Freight Line, Joplin, Mo., purchased by the applicant named herein pursuant to Finance Docket No. MC-F-618, approved November 30, 1938.

rier Act, 1935, and the rules and regulations prescribed by the Commission thereunder, **governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public,** a certificate of public convenience and necessity shall be issued, **unless otherwise ordered,** authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification **set forth as appended on the reverse side hereof or attached hereto** and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, and unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein **within 30 days from date of this order;** then said applicant shall show cause, if any there be, **within 60 days from the date of this order,** why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That the previous order entered in this proceeding describing the authority to which applicant's predecessor in interest has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(Seal)

Appendix to the order of the Interstate Commerce Commission, Division 5, dated the 14th day of March, A. D. 1939.

No. MC 89913 Sub 1*

Application of Frisco Transportation Company, a Corporation, St. Louis, Missouri.

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of the commodities indicated, over regular routes, between fixed termini, and to and from intermediate points, is as specified below:

Commodities generally, except those of unusual value, and except high explosives, household goods (when transported as a separate and distinct service in connection with so-called "household moving"), commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Joplin, Mo., and Miami, Okla., as follows:

From Joplin over U. S. Highway 66 to Baxter Springs, Kans., thence over U. S. Highway 166 to junction U. S. Highway 69, thence over U. S. Highway 69 to Miami;

From Joplin over U. S. Highway 66 to Miami; and

Return over these routes to Joplin.

All intermediate points on the above-specified routes.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 15.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 16,

RAILWAY LABOR EXECUTIVES' ASSOCIATION et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 18.

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

BRIEF OF APPELLEE.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 15.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 16.

RAILWAY LABOR EXECUTIVES' ASSOCIATION et al.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

No. 19.

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

BRIEF OF APPELLEE.

OPINIONS BELOW.

The "memorandum opinion" of the United States District Court for the Eastern District of Missouri, Eastern Division (R. 163-172) and the "memorandum opinion" of the District Judge who dissented (R. 173-5) are reported at 153 F. Supp. 572. The majority below supplemented their opinion by "Findings of Fact and Conclusions of Law"

(R. 177-86) which are not reported. The Report of the Interstate Commerce Commission, Division 5 (R. 559-87), is reported at 53 M. C. C. 415 and the Report of the Entire Commission on Oral Argument (R. 593-615) is reported at 62 M. C. C. 367.

JURISDICTION.

The basis of this Court's jurisdiction is correctly stated in the briefs of appellants.

STATUTES INVOLVED.

One of the bases of the District Court's decision was Section 212 (a) of the Interstate Commerce Act [49 Stat. 555; 52 Stat. 1238; 54 Stat. 924; 49 U. S. C., § 312 (a)]. The appellants in Nos. 15 and 16 raise a question under Section 5 (2) (b) of the Interstate Commerce Act [54 Stat. 906; 49 U. S. C., § 5 (2) (b)], which was formerly Section 213 (a) (1) of the Interstate Commerce Act (49 Stat. 556). These sections of the statutes are set forth in Appendix A.

QUESTIONS PRESENTED.

An order of the Interstate Commerce Commission revoked certain unrestricted certificates of public convenience and necessity eleven years after the Commission had issued such certificates to appellee, a rail-affiliated motor carrier. The certificates had been issued to appellee after its purchase of the unrestricted operating rights and properties of previously existing independent motor carriers under the provisions of former Section 213 (a) (1) [present Section 5 (2) (b)] of the Interstate Commerce Act. The sole ground for the Commission's revocation of the certificates was its finding that the same had been inadvertently issued in their unrestricted form. In lieu of such certificates, the Commission ordered the issuance of certificates limiting

appellee's operations to those auxiliary to and supplementary of the train service of its parent railroad. The District Court enjoined the Commission's order for the reasons that it was in violation of Section 212 (a) of the Interstate Commerce Act and because the finding of inadvertence was without adequate support in the evidence. Therefore, two questions are presented by these appeals:

1. Was the District Court correct in holding that the action of the Commission was an attempt to revoke a duly issued certificate made contrary to Section 212 (a) of the Interstate Commerce Act?

2. Was the District Court correct in holding that the Commission's finding that the certificates in question were inadvertently issued was without adequate support in the evidence?

STATEMENT OF THE CASE.

These cases involve the validity of an order of the Interstate Commerce Commission (hereinafter sometimes referred to as "the Commission") (R. 615-17) which revoked and cancelled certain certificates of public convenience and necessity held by appellee, a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company. The certificates sought to be revoked authorized appellee to perform motor carrier service directly for the public without any limitations or restrictions as to the type of service. In their stead the Commission ordered the issuance of new certificates which would limit appellee's operations to service which is "auxiliary to or supplemental of" the train service of its parent railroad by imposing conditions similar to those considered in **United States v. Rock Island Motor Transit** (1951), 340 U. S. 419. The sole basis for the Commission's action was its finding that the certificates were "inadvertently issued" (R. 610).

The District Court, with one judge dissenting, held that the Commission's order insofar as it revoked four of appellee's certificates should be enjoined[1] (R. 172, 175-6, 186) because it was contrary to Section 212 (a) of the Interstate Commerce Act [49 U. S. C. 312 (a)] under **Watson Bros. Transportation Co. v. United States** (U. S. D. C. Neb. 1955) 132 F. Supp. 905, aff. (1956), 350 U. S. 927 (R. 170, 185), and because the Commission's finding that the certificates in question had been "inadvertently issued" was without adequate support in the evidence (R. 171, 185).

Appellee's Operations and the Portions Here Involved.

Appellee operates a motor common carrier service (so-called "all-out" service, i. e., the transportation of general commodities for the public at motor carrier rates on motor carrier billing) over approximately 2,700[2] miles in the States of Missouri, Kansas, Oklahoma, Texas, Arkansas, Tennessee, and Mississippi, its principal routes extending from St. Louis, Missouri, southwest through Springfield, Missouri, to Oklahoma City, Oklahoma, and to Dallas, Texas, and from Kansas City, Missouri, southeast through Springfield, Missouri, to Memphis, Tennessee, and beyond to Columbus, Mississippi. In addition, it operates a route from St. Louis, Missouri, south through Cape Girardeau, Missouri, to Blytheville, Arkansas, which is restricted to the handling of freight in substitute service for its parent Railway Company. Appellee's operations generally parallel a part of the lines of its parent railroad, and over

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[1] The Commission's proceedings involved six certificates of appellee. Its order impressed restrictions upon five of those certificates. As to one of these five, herein called the "Bennett" certificate, the District Court affirmed the Commission's action under *United States v. Rock Island Motor Transit* (1951), 340 U. S. 419.

[2] The evidence shows 4,800 miles (R. 237). However, a portion of that mileage is no longer operated.

most of its routes service is limited to points which are stations on the parent railroad or to points not more than ten miles from such stations.

The greater part of appellee's motor carrier system was acquired by the purchase of existing operating rights and physical properties of independent motor carriers pursuant to former Section 213 [now Section 5 (2) (b)] of the Interstate Commerce Act. All of these acquisitions were authorized by the Commission after hearing. Appendix B contains a list of appellee's principal acquisitions.

The proceedings before the Commission which are the subject of these appeals involved six such segments of appellee's over-all operations, 284 miles in all, but which are so situated that, if restricted as proposed, the value of the balance would be seriously impaired, if not destroyed. Throughout the proceedings before the Commission these segments were referred to by their respective Commission docket numbers which, because of their similarity, are not ideal for descriptive purposes. The District Court referred to these segments by the name of the vendor from whom purchase was authorized and described the segments as follows:

> "• • • These are the 'Cooper' route from Joplin, Missouri, to Carthage, Missouri; the 'Hamm' route from Joplin, Missouri, to Miami, Oklahoma; the 'Tolson' route from Walnut Ridge, Arkansas, to Memphis, Tennessee; the 'Parker' route from Blytheville, Arkansas, to Memphis, Tennessee; the 'Rose' route from Hugo, Oklahoma, to Paris, Texas, and the 'Bennett' route from Blytheville, Arkansas, to Lake City, Arkansas. In its reconsideration of the 'Rose' certificate the Commission ordered no change. The operating certificate for the 'Bennett' route was issued in 1940 with the recital of a reservation of power to impose additional restrictions on the scope of activities per-

mitted under the certificate, and hence, under the rule of United States v. Rock Island Motor Transit Co., 340 U. S. 419, rehearing denied 341 U. S. 906, there can be little question of the power of the Commission to impose the restrictions which it has incorporated in the amended Bennett certificate" (R. 165).

Since neither the Commission nor the District Court ordered any change in the "Rose" certificate, it is not involved in this appeal; and since the appellee has raised no objection to the District Court's ruling that the Commission's findings and order in connection with the "Bennett" certificate were proper, these appeals involve only the "Cooper", "Hamm", "Parker", and "Tolson" certificates.

History of These Cases and Evidence Before the Commission.

During 1938 and 1939, appellee filed applications with the Commission under Section 213 of the Motor Carrier Act of 1935 (49 Stat. 556) to purchase the motor carrier operating rights and properties of "Cooper", "Hamm", "Parker", and "Tolson". After hearings were held and examiner's proposed reports were issued in connection with each application, Division 5 of the Commission approved the purchase by appellee of the operating rights and properties of these motor carriers and concluded with the following language (one commissioner dissenting in each case):

"[We find that the purchase by appellee of the operating rights and property of Hamm, Cooper, Parker and Tolson upon the terms and conditions set forth in the applications] which terms and conditions are found to be just and reasonable, will be consistent with the public interest, will promote the public interest by enabling the St. Louis-San Francisco Rail-

way Company (J. M. Kurn and John G. Lonsdale, trustees) to use service by motor vehicle to public advantage in its operations, and will not unduly restrain competition, and that the conditions of section 213 have been or will be fulfilled; provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said railway company, and shall not unduly restrain competition."

(Cooper, 15 M. C. C. 317, 319, R. 641-2; Hamm, 15 M. C. C. 320, 322, R. 636; Parker and Tolson, 25 M. C. C. 96, 100, R. 629.)

Following this action by Division 5, appellee completed the purchases, and operations of the same nature as those conducted by appellee's predecessors in interest were commenced by appellee in early 1939,[3] and have continued without change as to the nature of such operations and without interruption to the present time.

On various dates in 1939,[4] the Commission issued orders commonly referred to as "compliance orders" in connection with the "Cooper" (R. 441-3), "Hamm" (R. 411-13), "Parker" (R. 455-7) and "Tolson" (R. 475-7) purchases which authorized and directed the issuance to appellee of certificates of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle covering operating authority previously ap-

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[3] These steps were taken with the full knowledge and consent of the Commission in accordance with its regular procedures. See Exhibits 10-A (R. 402), 12-A (R. 433), 13-A (R. 445), and 14-A (R. 461).

[4] Cooper purchase March 11, 1939; Hamm purchase March 14, 1939; Parker purchase June 16, 1939; and Tolson purchase July 10, 1939.

plied for by "Cooper", "Hamm", "Parker" and "Tolson". These orders provided for the issuance of certificates **with no restrictions as to the type of motor common carrier service.**

On March 31, 1942, in the cases of "Cooper" and "Hamm" (R. 498-500) and on April 18, 1942, in the cases of "Parker" and "Tolson" (R. 501-3), the Commission granted to appellee certificates of public convenience and necessity which included inter alia the operating rights purchased from these four vendors, which **certificates contained no restrictions** as to the type of motor common carrier service authorized thereunder.

In July, 1941, prior to the issuance of the certificates of public convenience and necessity in the "Cooper", "Hamm", "Parker" and "Tolson" purchases, competing motor carriers filed a complaint with the Commission, alleging that appellee was operating a motor carrier service independent of its parent railroad's rail service and in contravention of the condition imposed by the Commission in the finance hearings. After appropriate proceedings, the Commission concluded in 1946 that appellee was not operating in violation of the terms of its certificates. (**Campbell Sixty-Six Express, Inc., et al. v. Frisco Transportation Company**, [1946], 46 M. C. C. 222.) The Commission's opinion indicated that the ruling should not be taken as sanctioning such operation since the proceedings pursuant to which the "Cooper", "Hamm", "Parker" and "Tolson" certificates were issued to appellee had been reopened for further hearing by Division 5 in accordance with its report, 43 M. C. C. 641, which the Commission was reversing.

This reopening order, which was entered on January 4, 1945 (R. 196), began the proceedings which give rise to these appeals. It reopened for reconsideration the proceedings by which appellee acquired the segments of its

operation purchased from Rose, Cooper Hamm, Parker, Tolson and Bennett, and provided that an examiner's proposed report should be served on the parties. Pursuant to that order, Examiner David Waters filed a proposed report on reconsideration on February 8, 1945 (R. 198). That report recommended that the Commission should find that a reservation had been "inadvertently" omitted from the six certificates in question (R. 199, 213) and should, therefore, impose restrictions on the operations authorized by these certificates designed to limit such operations to those which were auxiliary and supplementary to the train service of the parent railroad. After appellee filed exceptions to this proposed report, another reopening order was issued by the Commission on May 28, 1945, this time for further hearing (R. 217). Subsequently the reopened proceedings were set for hearing before an examiner (R. 218-220).

At that hearing appellee renewed its motion to discontinue the proceedings and offered two witnesses for the purpose of proving certain matters in connection with that motion (R. 226-9). The first of these witnesses, an auditor for appellee, testified concerning appellee's financial status (R. 231-259). The other witness was appellee's Assistant General Manager who offered testimony accompanied by documents to show that the certificates in question were issued in the form intended by the Commission (R. 259-268, Exhibits 10A-16A, R. 403-527).

Over appellee's protest, the examiner required appellee to furnish two other witnesses (R. 271-278). One of these was an employee of appellee's parent railroad company. His testimony was limited to a description of the rail merchandise operations of the parent railroad (R. 281-332). The other, appellee's General Manager, testified concerning the history of appellee and its operations (R. 333-88).

The testimony of these four witnesses and the exhibits offered in connection therewith constitute all of the evidence taken at any time by the Commission in connection with the reopened proceedings. No evidence was offered either by the Commission or by any other person, nor was any other hearing ever held.

On May 17, 1948, a recommended report and order on further hearing was filed by Examiners William T. Croft and Beverley S. Simms (the latter was not present at the hearing) (R. 529). This report recommended that the Commission find that appellee's certificates above-described (except Bennett) were inadvertently issued and that those certificates (except Rose) should be revoked and new or amended certificates issued containing restrictive conditions designed to limit appellee's service to that which would be auxiliary to or supplementary of the train service of the parent railroad.

After appellee filed exceptions to this recommended report, Division 5 of the Commission issued its report (R. 559). This report differed from the report of the Examiners but upheld its recommended findings with no material change.

An important feature of this report, so far as these appeals are concerned, was its holding that the Commission could "take official notice of [its] administrative procedures and practices"[5] (R. 572). Upon the basis of this holding, Division 5 proceeded to outline the procedure by which certificates were issued (R. 572-3). As a result of its recitation of these administrative practices and procedures, Division 5 held that the omission of a reservation of the power to further restrict appellee's operations had been inadvertently omitted from the certificates and that, therefore, the certificates had been inadvertently issued

[5] The Brief of the Commission cites this holding at page 23 as does the Brief in No. 16, p. 34.

(R. 573). At the only hearing held no mention had been made of the administrative practices or procedures or of taking notice thereof.

Thereafter appellee filed its petition for reconsideration of the report of Division 5 and the Commission reopened the proceeding for oral argument (R. 599); and, after argument, issued its report of the Commission on oral argument (R. 593) and the order which is here under attack (R. 615).

The report of the entire Commission dropped in its entirety the language of Division 5 with respect to the taking of judicial notice of the administrative practices and procedures of the Commission. The basic conclusion of the Commission was in accord with the prior reports: "To the extent that the certificates issued failed to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued" (R. 603). Under these circumstances the Commission held that it was not necessary for it to proceed under Section 212 (a) since no diminution of authority or partial revocation of authority was involved (R. 603-4).

After appellee's petition for reconsideration of this report was denied (R. 557), suit was filed in the District Court to set aside the Commission's order (R. 1). After appropriate proceedings before the District Court (R. 25-162), judgment was entered enjoining the Commission's order as it applied to the Cooper, Hamm, Parker and Tolson certificates (R. 175). The Interstate Commerce Commission and the defendants who were allowed to intervene in support of the Commission appealed to this Court. The Defendant United States of America did not file notice of appeal to this Court, but did file a "Memorandum" in No. 19 adopting the brief of the Interstate Commerce Commission, appellant in that case.

SUMMARY OF ARGUMENT.

I.

Former Section 213 (a) (1) of the Interstate Commerce Act (present Section 5 (2) (b) thereof) does not prohibit the issuance of a certificate authorizing motor carrier service directly for the public by a rail-affiliated motor carrier where operating rights are purchased from an existing carrier. This Court has approved the issuance of such certificates to rail affiliates where applications for new authority are filed under Section 207 of the Act. **American Trucking Associations, Inc., v. United States** (1957), 355 U. S. 141. Section 5 (2) (b) has been construed to authorize the Commission to require a rail affiliate to limit its service to that which is auxiliary to and supplementary of the train service of its parent railroad as a condition of its purchase of operating rights of an existing motor carrier, **United States v. Rock Island Motor Transit Company** (1951), 340 U. S. 419; but although previously considered in detail, this section has never been construed as requiring the Commission to impose such a restriction.

In order to properly administer the Act and maintain the proper balance between railroads, and affiliated truck lines and independent motor carriers, as well as to insure maximum service for the public, the Commission must have the discretion to determine whether or not restriction is called for or justified under the facts of each individual case. The Commission takes this view of Section 5 (2) (b) and is currently issuing such unrestricted certificates to rail-affiliated motor carriers in cases where the evidence justifies issuance, and the statutory conditions are satisfied.

II.

Since the Commission has the power to issue unrestricted certificates to a rail-affiliated motor carrier, the certificates which it attempted to revoke in the present case were fair upon their face and duly issued and could be revoked, under the provisions of Section 212 (a) of the Interstate Commerce Act, only for willful failure to comply with the provisions of the Motor Carrier Act or regulations thereunder. The Commission's action in this case amounted to a revocation of the certificates in question and because such revocation was for reasons other than those provided in Section 212 (a), it was invalid, **Watson Brothers Transportation Co. v. United States** (U. S. D. C. Neb. 1955), 132 F. Supp. 905, motion to affirm granted (1956), 350 U. S. 927.

Section 212 (a) has been strictly construed as a limitation upon the power of the Commission to revoke certificates. Revocation of motor carrier certificates upon the ground of inadvertent issuance is a dangerous practice because of the lack of any reliable or ascertainable standard as to the meaning or existence of inadvertence. If the Commission is allowed to revoke upon the ground of inadvertence, no certificate would be safe from such an attack, nor could any certificate be considered by its holder to be final.

III.

The District Court was correct in finding that there was no evidence to support the Commission's finding that the certificates in question were "inadvertently issued". The Commission inferred that inadvertence existed from two facts; viz., (1) the appearance in the reports approving the purchases of a reservation of the power to restrict in the future and (2) the absence of such a reservation from the certificates. Such an inference cannot be employed be-

cause the facts upon which it is based give equal support to two inconsistent inferences, i. e., inadvertent omission and intentional omission. **Pennsylvania Railroad v. Chamberlain** (1933), 288 U. S. 333. Furthermore, since there was positive uncontradicted evidence in the form of compliance orders issued by the Commission between the report approving the purchase and the issuance of the certificate ordering the issuance of unrestricted certificates, the Commission was not entitled to infer that the certificates were inadvertently issued.

None of the appellants take direct issue with the District Court's finding that the finding of "inadvertence" was without adequate support in the evidence. Instead they attack the finding indirectly by reference to the District Court's comments upon the evidence and by arguing that the Commission could have supplied any deficiency of evidence by taking "official notice" of its practices and procedures. This use of "official notice" is contrary to settled law. **Ohio Bell Telephone Co. v. Commission** (1937), 301 U. S. 292.

ARGUMENT.

I.

The Requirements of Section 5 (2) (b) of the Interstate Commerce Act Do Not Prohibit the Issuance of Unrestricted Certificates to Rail-Affiliated Motor Carriers.

Appellants in Nos. 15 and 16 seek a determination by this Court that Section 5 (2) (b) of the Interstate Commerce Act [54 Stat. 906, 49 U. S. C., § 5 (2) (b)] (formerly Section 213 (a) (1) of the Motor Carrier Act of 1935) absolutely prohibits the Interstate Commerce Commission from issuing a certificate of public convenience and necessity to a rail-affiliated motor carrier which authorizes motor service directly for the public when the basis for such certificate is the purchase of operating rights from an existing motor carrier. At the last term this Court decided that the Commission may properly issue such an unrestricted certificate to a rail-affiliated motor carrier upon the basis of an application for new operating rights under Section 207 of the Act (49 Stat. 551, 49 U. S. C., § 307) in **American Trucking Associations, Inc., v. United States** (1957), 355 U. S. 141.

Appellants seek to support the construction of Section 5 (2) (b), which they now assert, upon the basis of a statement by this Court in the **American Trucking Associations** case. Their concern over this matter arises from the fact that the Commission is currently issuing certificates which authorize service by rail-affiliated motor carriers directly for the public in some cases (Brief No. 15, pp. 7-12; Brief No. 16, pp. 37-40).*

There are many very obvious reasons why this claim of the appellants is without merit and should not be passed upon by this Court in these appeals. Initially, the conten-

tion of appellants is in conflict with the language of the proviso which does not, upon its face, prohibit the issuance of such certificates by the Commission. It reads:

> "* * * Provided, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition" (49 U. S. C., § 5 (2) (b)).

If it had been the intention of Congress to absolutely limit the Commission's power so that no rail-affiliated motor carrier could receive a certificate authorizing service directly for the public, it would have been a simple matter to so provide. Certainly the language of this proviso does not convey such an intention.

Upon at least two occasions prior to **American Trucking Associations, Inc., v. United States**, this Court had occasion to consider the meaning of the proviso in Section 5 (2) (b). In **United States v. Rock Island Motor Transit Company** (1951), 340 U. S. 419, the Court said, in considering the "statutory authority" of the Commission to issue a certificate of convenience and necessity covering an acquisition by a rail affiliate under Section 5 (2):

> "We think that at the time of issuance of the certificate, if the Commission reasonably deems the restriction useful in protecting competition, or for other statutory purposes, the Commission **may** require the railroad-affiliated motor carrier to perform only those services that are auxiliary and supplemental to the rail service" (Emphasis added) (l. c. 340 U. S. 430-431).

The use of the permissive "may" clearly negatives an absolute restriction upon the Commission's power. After considering other sections of the statute, the Court continued:

> "The language of the proviso of § 5 (2) (b), we hold, gives the Commission power to enforce the reservation in the certificate • • •.
>
> *Auxiliary and Supplemental.*—The Interstate Commerce Act sets out only generally requirements that must be met by railroad applicants for motor-carrier certificates. In acquisition cases under § 5 (2) the certificate is not to be issued without the statutory findings discussed above that the proposed merger or consolidation will be in the 'public interest' and that the railroad can use the motor service 'to public advantage in its operations.'
>
> The words 'auxiliary to or supplemental of' are not taken from the Act. There is no such specific limitation for railroad operation of motor carriers. Their connotation is to be gathered from the context in which they have been employed by the Commission. The certificate, pp. 423-424, *supra*, used the phrase to avoid undue restraint on competition. That has been its use from the beginning. The only competition at which the limitation was directed was full railroad competition with over-the-road motor carriers. Appellees urge that the meaning of the words is limited by its application through the restrictions on the certificates at the time it was issued, December 3, 1941" (l. c. 340 U. S. 436-437).

Nothing in this discussion indicates that the Court had any intention to construe Section 5 (2) (b) as requiring that a limited certificate only should be issued to motor carriers. Rather, the opinion taken as a whole demonstrates that the Court was convinced that it was the intention of Congress to grant to the Commission the power to

limit the operation of a rail-affiliated motor carrier, or to allow such a carrier, upon certain proof, to engage in motor carrier service directly for the public.

This interpretation of the **Rock Island** case is supported by this Court's decision in **Interstate Commerce Commission v. Parker** (1945), 326 U. S. 60. A consideration of the **Parker** and **Rock Island** cases leads to the conclusion that this Court's language in **American Trucking Associations, Inc., v. United States**, 355 U. S. 141, about "a rigid requirement of Section 5 (2) (b)" referred to the requirement that the Commission must make certain statutory findings before it could authorize motor carrier service by a rail-affiliated motor carrier, and not to an absolute limitation upon the power of the Commission.

The wisdom of a construction of Section 5 (2) (b) which authorizes the Commission, upon the required statutory findings, to grant unrestricted certificates to rail-affiliated motor carriers, is borne out by the Commission's current practice of issuing such certificates. The cases cited by the appellants in No. 15 all reveal that unless the Commission has such power some communities would be without common carrier service because of a failure of motor common carriers to furnish adequate or, in some cases, any service.[6] Other reasons necessitating the grant of unrestricted rights to rail-affiliates are illustrated in the Commission's order in this case: viz., Rose Certificate (R. 606) and service to Dyess, Arkansas (R. 607).

Unless Section 5 (2) (b) of the Act is construed so as to give the Commission the power, upon the required statutory findings, to grant unrestricted certificates to rail-affiliated motor carriers, its ability to properly regulate the transportation industry as a whole would be hampered. There is no question but that the Commission has granted

[6] In the cases cited by the American Trucking Associations at pages 10 and 11 of its brief, it has unsuccessfully advanced this same argument to the Commission.

such unrestricted certificates in the past, e. g., the certificates granted to appellee in many proceedings other than those here involved. Furthermore, many railroads obtained such certificates under the grandfather clause (Section 206 of the Act). Certainly there has never been any suggestion that the granting of such certificates has stifled or restrained competition in any way, and the policies followed by the Commission and professed by it on the record in this case of granting unrestricted certificates in such cases (R. 145) have certainly not interfered with the development of a strong and vigorous independent trucking industry.

It is noteworthy that the appellants in Nos. 15 and 16 do not assert that the construction of Section 5 (2) (b) for which they contend is required because of any threat of monopoly by the railroads. Such a statement would, of course, have little meaning in light of recent testimony before the Subcommittee on Surface Transportation of the Committee on Interstate and Foreign Commerce, United States Senate, 85th Cong., 2nd Sess., where the declining railroad situation was established beyond question.

In fact, one of the chief executives[7] of a labor union member of the Railway Labor Executives' Association, appellant in No. 16, stated in **The Locomotive Engineer, March 14, 1958**, that "In my opinion, the railroad companies should be permitted to sell transportation. I am convinced they should be able to engage in the air, highway and water transportation business, co-ordinating the various forms to give the best possible service to the public, offering such services alone or in combination with rail transportation."

Furthermore, the testimony of Commissioner Eastman as to the reason for the proviso given before a Subcommittee of the Committee on Interstate Commerce, United

[7] Guy L. Brown, Grand Chief Engineer, Brotherhood of Locomotive Engineers.

States Senate, on S. 3606, 75th Congress, 3rd Session, p. 23, does not support the construction of that proviso now advanced by appellants (see footnote 3, I. C. C. v. Parker, 326 U. S. 67, and footnote 9, United States v. Rock Island, 340 U. S. 431).

The appellants in No. 15 suggest that the District Court did not deal with their contention that Section 5 (2) (b) should be construed to prohibit the issuance of unrestricted certificates to a rail-affiliate. The colloquy between Judge VanOosterhout and counsel for the Interstate Commerce Commission refutes this contention (R. 145), as does the holding of the District Court that the Commission's action was an attempt made contrary to Section 212 to revoke "duly issued" certificates.

No answer to the argument of appellants in No. 15 and No. 16 would be complete without pointing out that this question was never presented to the Interstate Commerce Commission. In fact, there was not any intimation in any brief or argument before the Commission that the appellants in No. 15 challenged the Commission's power to issue the unrestricted certificates until their answer was filed in the District Court (R. 34). The appellants in No. 16 were not even parties before the Commission. Simple fairness would seem to dictate that the Commission should have been given an opportunity to express its views upon such a question (cf. **United States v. Tucker Truck Lines** [1952], 344 U. S. 33, 37). While these appellants express grave concern over an alleged lack of notice with respect to the compliance orders, their concern does not extend to the rail-affiliated motor carriers holding unrestricted certificates which would be rendered valueless if their contentions in this case are upheld. Certainly the present contentions of these appellants constitute a collateral attack upon many certificates, of which attack the rail-affiliated certificate holders were never advised while this case was pending before the Commission.

II.

The District Court Correctly Held That the Action of the Commission Was an Attempt Made Contrary to Section 212 to Revoke and Change Duly Issued Certificates.

The Interstate Commerce Commission (appellant in No. 19) and the Railway Labor Executives' Association (appellant in No. 16) attack the holding of the District Court that the action of the Commission was an attempt to revoke duly issued certificates contrary to Section 212 (a) of the Interstate Commerce Act [49 U. S. C. 312 (a)]. Many arguments are advanced against this holding: that the Commission as a quasi-judicial body must have the power to correct errors (Brief No. 19, p. 13; Brief No. 16, p. 23); that it has inherent power to do so (Brief No. 19, p. 19); that it and other agencies have exercised the power to correct errors (Brief No. 19, pp. 14-16; Brief No. 16, pp. 23-24); and that Section 212 (a) does not deprive the Commission of power to correct errors in certificates (Brief No. 19, pp. 20-22).

At least a part of these arguments is directed against a "straw man" erected by these appellants, for the opinion and the findings of fact and conclusions of law of the District Court may be searched in vain for any holding that the Commission does not have the power either inherently, impliedly or specifically to correct clerical errors. The District Court's holding is not that the Commission does not have the power to correct clerical errors, but is that its action **here** was more than such a correction. The District Court stated this as succinctly as possible in one sentence of its opinion: "Under [**Watson Brothers Transportation Co. v. United States** (1956), 132 F. Supp. 905, aff. 350 U. S. 927] the action of the Commission is an attempt made contrary to Section 212 to revoke and change a certificate duly issued, and is more than the mere correction of a clerical error" (R. 170).

The real question with which the District Court was confronted was: Could the Commission lawfully revoke appellee's unrestricted certificates and reissue such certificates in restricted form without contravening the provisions of Section 212 (a)? The Commission recognized that Section 212 (a) had to be circumvented, otherwise its action would be invalid. Accordingly, it found that its action in revoking appellee's certificates was not governed by Section 212 (a), using the following language:

> "We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. **Under these circumstances the certificates may be revoked, and certificates in accord with such findings issued, without proceeding in accordance with provisions of section 212 (a).** No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved." (Emphasis added.) (R. 603-4.)

The Commission's conclusion that Section 212 (a) did not apply to the action that was taken in this case was based upon a statement it made in 1942 in **Smith Bros. Revocation of Certificate**, 33 M. C. C. 465:

> "In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically pro-

vided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. To hold that under section 208 (a) we have the power to include in certificates self-executing forfeiture terms, conditions, or limitations would make section 212 (a) merely surplusage and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the act.

"In expressing the views stated above, we do not desire to be understood as holding that a certificate obtained [by fraud, or misrepresentation, or one issued in error[8]] by this Commission, may not be changed or revoked without proceeding under section 212 (a). Here, there is no question of fraud, misrepresentation, or a certificate issued in error" (l. c. 33 M. C. C. 472).

Patently, the statement concerning "inadvertently issued" certificates was obiter dictum. Despite the well-settled rule that such expressions should not control the result of subsequent cases[9], the Commission has through the years based its action correcting certificates, which allegedly were inadvertently issued, upon this statement in the **Smith Bros.** case.

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[8] Modified to read: "by fraud or misrepresentation, or inadvertently issued." 42 M. C. C. 211.

[9] *Harriman v. Northern Securities Co.* (1905), 197 U. S. 244, 291.

It will not be the purpose of this brief to argue the merits or demerits of the cases where the Commission has cancelled certificates on the grounds of inadvertence where the certificates were prematurely issued, e. g., Greyhound Corp. Extension Slidell, La. (1947), 47 M. C. C. 103, cited by the appellants in Nos. 16 and 19, or where a certificate authorized service to a non-existent point by inserting an erroneous state designation, e. g., Motor Rail Application (1949), 49 M. C. C. 109, or the other incidents where the Commission has acted upon the "inadvertence" power implied in the **Smith** case without objection by the parties affected.

Rather, we point to the settled rule, recognized in the **Smith Bros.** case (l. c. 33 M. C. C. 471), that the Commission is an agency of limited powers and, therefore, important powers should not be read into the Interstate Commerce Act by implication.[10] Against the back-drop of this rule, the plain and unambiguous language of Section 212 (a) authorizing revocation only upon the grounds of willful violation of the act or regulation of the Commission allows no room for implication of any additional grounds for revocation and compels the strict interpretation which has been applied by this Court in the past.

In another "inadvertence" case involving a water carrier certificate, **United States v. Seatrain Lines, Inc.** (1947), 329 U. S. 424, this Court said, in commenting upon the **Smith Bros.** case:

> "We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded * * * that the issuance of the original certificate was not an 'inadvertent' error which the Commission's subsequent action was intended to correct.
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> * * * * * * * *

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[10] *Thompson v. U. S.*, 246 U. S. 547; *U. S. v. Pennsylvania R. R.*, 242 U. S. 208.

"But in ruling upon its power to revoke motor carrier certificates the Commission itself has held that unless it can find a reason to revoke a motor carrier certificate, which reason is specifically set out in § 212 (a), it cannot revoke such certificate under its general statutory power to alter orders previously made. *Smith Bros. Revocation of Certificate*, 33 M. C. C. 465" (l. c. 329 U. S. 428-31).

The majority of the Commission looked upon this Court's citation of the **Smith Bros.** case as an implied acceptance of its power to revise an inadvertently issued certificate (R. 602). However, this view was apparently not shared by the two Commissioners who dissented (R. 611, 613).

The District Court did not agree with the Commission that the revocation of a certificate is any less a revocation because it is done upon the ground of correcting a clerical error. In so deciding, the District Court relied upon **Watson Bros. Transportation Co. v. United States** (U. S. D. C. Neb., 1955), 132 F. Supp. 905, aff. 1956, 350 U. S. 927.

The appellants go to great lengths attempting to distinguish **Watson** because it presents the clearest case in which the courts have condemned the revocation of a certificate upon the sole ground that it had been inadvertently issued.

There Watson had, prior to 1947, been granted various operating rights by the Commission. Under some of those rights it was not authorized to transport dangerous explosives. It filed an application seeking a certificate which would authorize the transportation of such explosives "on all the routes" over which it was authorized to haul general commodities, which term as used by the Commission does not include dangerous explosives. At the hearing, its application was amended to seek authority to serve the United States Government with explosives at four arsenals,

to and from which it then had no authority to transport either general commodities or explosives.

The trial examiner's recommended report and order provided that Watson be granted authority to transport only dangerous explosives to and from the four arsenals involved. No exceptions were taken to this report and it became the report and order of the Commission. Subsequently, however, the Commission issued a certificate to Watson which authorized the hauling of *general commodities* to and from the four arsenals. After the issuance of this certificate, Watson expended substantial sums of money for equipment to be used in rendering the service authorized by the certificate.

Thereafter, on the sole ground that the certificate had been issued "through inadvertence," the Commission, without notice or hearing, issued an order which changed Watson's certificate to provide for hauling to and from the four arsenals of *only explosives*. Watson brought suit before a three-judge court to enjoin the enforcement of this order, and the court held:

> "The Certificate issued July 19, 1949, granted plaintiff authority to transport 'general commodities' to and from four designated ordnance plants. The order of August 25, 1953, restricts this authority to the transportation of Class 'A' and 'B' explosives. Since the latter order was issued without notice and hearing and for reasons other than those stated in Section 212 (a), it is invalid.
>
> "Counsel for the Commission argues that the order of August 25, 1953, merely corrects a clerical error in the certificate of July 19, 1949. Even if the court were to assume that the Commission has authority to correct clerical errors without notice and hearing, the result in this case would not be different, because it is the holding of the court that the order of August 25, 1953, is more than the mere correction of a clerical

error; and is an attempt made contrary to Section 212 to revoke and change a certificate duly issued" (l. c. 132 F. Supp. 909).

This Court granted a Motion to Affirm (350 U. S. 927).

The certificates here in question are, and were, admittedly unrestricted, and the Commission has previously held that the "performance of direct motor carrier service" by the appellee over the routes covered thereby is lawful [**Campbell Sixty-Six Express, Inc. v. Frisco Transportation Company** (1946), 46 M. C. C. 222, 224-225].

That the intention of the Commission's order and its effect are to revoke and cancel these certificates is clear and unmistakable from the report of the Commission.

> "Under these circumstances the certificates may be revoked * * *" (R. 603).
>
> "We find that the certificates * * * should be cancelled * * *" (R. 610).

The narrow limits within which the Commission has power to revoke or change certificates is clearly indicated by the decision of this Court in **Castle v. Hayes Freight Lines** (1954), 348 U. S. 61, 63-4, where the Court said:

> "And [49 U. S. C. Sec. 312], provides that all certificates, permits or licenses issued by the Commission 'shall remain in effect until suspended or terminated as herein provided', but in order to provide stability for operating rights of carriers, Congress placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate. No certificate is to be revoked, suspended or changed until after a hearing and a finding that a carrier has willfully failed to comply with the provisions of the Motor Carrier Act or with regulations properly promulgated under it."

Castle stands for the proposition that an agency other than the Commission (there a state) may not revoke a certificate.

The holding in **Watson Bros. Transportation Company v. United States** (supra), emphatically demonstrates that the Commission does not possess the power to cancel a certificate for reasons other than those stated in Section 212 (a).

In the **Watson** case, the order which was enjoined merely reduced the number of commodities which could be handled over the routes involved. In the present case, the order under attack has the effect of changing completely the type of service which appellee can render over the routes in question.

Furthermore, the restriction of the type of authorized operation over the "Hamm" and "Cooper" segments was designed to—and unquestionably does—obliterate appellee's right to render all-motor service between all points north and east of that segment on the one hand and points south and west thereof on the other. The same is true of the restriction of operations over the "Tolson" segment. In short, certain of appellee's previous rights have been completely cancelled. Clearly if, as in the **Watson** case, a reduction of the number of commodities a carrier can handle over a certain route is "an attempt made contrary to Section 212 to revoke and change a certificate duly issued", then the District Court was correct in holding that the absolute cancellation of appellee's rights to render service directly for the public is likewise contrary to the provisions of that section.

One need not go far into the record in this case to see the wisdom of the strict interpretation of Section 212 represented by **Castle** and **Watson**. Appellee's purchase of "Hamm", for example, was completed on January 3, 1939 (R. 408). Thereafter in correspondence with the Com-

mission, appellee was instructed to adopt the vendor's tariffs—which provided for motor carrier service directly for the public (R. 403-4). Appellee advised the Commission that it did adopt such tariffs (R. 405-6) and on March 11, 1939, the Commission issued the "compliance order" directing that a certificate should issue with no restrictions as to the type of service authorized to be rendered (R. 411-13). In the interval between the issuance of the compliance order and the issuance of a certificate (R. 414), the Commission considered the content of the compliance order and the character of appellee's service without ever intimating that it had any intention of limiting appellee's service to that which was auxiliary to or supplementary of the train service of the parent railroad. **Ozark Truck Lines, Inc.—Common Carrier Application** (1942), 32 M. C. C. 459, and **Frisco Transportation Company-Purchase-Ozark Truck Lines, Inc.** (1940), 35 M. C. C. 255.

Approximately the same sequence of events occurred in connection with the "Cooper", "Parker" and "Tolson" purchases. See Exhibits 12A (R. 433), 13A (R. 445) and 14A (R. 461).

After all of these considerations and after the filing of a complaint by other carriers (**Campbell Sixty-Six Express, Inc., et al. v. Frisco Transportation Company**, 46 M. C. C. 222), it was not until the report of Examiner David Waters, issued on February 8, 1945 (R. 198), that there was ever any indication that there was inadvertence connected with the issuance of the certificates in question. As we will discuss below, there was absolutely no evidence to support Examiner Waters' finding of inadvertence and at no time subsequent to the issuance of that report did the Commission or any other person ever offer evidence from which the Commission could have found that inadvertence did in fact exist in the issuance of appellee's certificates.

It is difficult to imagine any circumstances under which an inadvertent error could not be claimed if the Commis-

sion may successfully claim one in this case. Unquestionably this is the reason why the brief of the American Trucking Associations (Appellant in No. 15) is silent as to the District Court's finding that the Commission's action was contrary to Section 212. If the Commission's decision had been allowed to stand, there would not be a single motor carrier certificate which would be safe from the claim of inadvertent issuance.

We submit that the District Court was correct in holding that the action of the Commission was more than the mere correction of a clerical error and was, in fact, an attempt made contrary to Section 212 (a) of the Interstate Commerce Act to revoke a "duly-issued" certificate.

III.

The District Court Was Correct in Finding That the Commission's Order Was Without Adequate Support in the Evidence.

(a) The Commission's finding that the certificates were "inadvertently issued" was based upon an inference.

In its memorandum opinion the District Court found that the Commission's finding that appellee's certificates had been issued inadvertently was "without adequate support in the evidence" (R. 171). As facts, the District Court found:

> "21. The facts as to the various steps in the handling of this case beginning in 1938 and extending through the issuance of the certificates in 1942, as stated in findings of fact 6-13, inclusive, herein, do not support the Commission's finding that such certificates were issued in their unrestricted form as a result of a clerical error or errors. Rather, a complete examination of the record fails to disclose any evidence

that a clerical error in fact existed in the issuance of the certificates in question.

"22. There was no evidence of record before the Commission which could be used as a basis for finding that a clerical error existed in the issuance of plaintiff's certificates bearing numbers MC 89913, Sub. No. 1, MC 89913, Sub. No. 3, MC 89913 Sub. No. 5 and MC 89913, Sub. No. 6" (R. 182).

As a matter of law, the District Court concluded:

"11. The finding in the order of December 7, 1953, that the Hamm, Cooper, Parker and Tolson certificates were 'inadvertently issued' is without adequate support in the evidence" (R. 184-5).

"16. In addition, because the Commission's finding that said certificates were issued as a result of clerical error is without the support of adequate evidence, the order of December 7, 1953, as it applies to the certificates described in conclusion of law 15, should be enjoined, set aside, suspended and annulled" (R. 185).

It is noteworthy that none of the appellants take direct issue with these conclusions. Rather, they attempt to attack them indirectly. Appellants in No. 15 merely ignore these conclusions, discussing instead the question of whether any notice of the compliance orders was or should have been given to the motor carrier protestants and attempting to distinguish the **Watson Bros.** case (Brief No. 15, pp. 12-19).

On the other hand, appellants in No. 16 seem to take the position that because two examiners' proposed reports, a Division 5 report and a Commission report found that the certificates had been inadvertently issued, there must have been evidence to support the finding of inadvertence. These appellants do not direct their argument to the specific findings of fact and conclusions of law above noted, but instead they criticize the District Court's memorandum

opinion in which that court stated that its view of the evidence was that no clerical error existed. These appellants, apparently sensing the insufficiency of the evidence to support the finding of inadvertence, refer to the report of Division 5 where the Division attempted to take judicial notice of its administrative practices and procedures (R. 572, Brief No. 16, pp. 27-35).

Still a third position is taken by the Interstate Commerce Commission, appellant in No. 19. It ignores the conclusion of the District Court that the Commission's finding was without adequate support of evidence, as well as the District Court's view that such evidence as did exist compelled the conclusion that no clerical error existed, and attacks the District Court's comment that the Commission's action reflected a change in its policy rather than a correction of a clerical error.

The failure of any of the appellants to take direct issue with the findings of facts 21 and 22 and conclusions of law 11 and 16 of the District Court represents, in our view, a fatal weakness in the differing position each of them takes. However, in the interest of not only supporting the opinion of the District Court, but of also demonstrating the fatal weakness in the report and order of the Interstate Commerce Commission, we will proceed to demonstrate by reference to the Commission's report and to the matters included in the evidence that there was no basis whatsoever for the ultimate finding of the Commission that the certificates sought to be revoked were inadvertently issued.

The report of the Commission opens with the statement that the proceedings involved "principally the issue of whether certain certificates heretofore issued Frisco Transportation Company * * * were inadvertently issued" (R. 593). The finding of the Commission is stated as follows:

> "We find that the certificates issued to the Frisco Transportation Company in the [Hamm-Cooper, Tolson,

Parker and Rose] were inadvertently issued; that such certificates except [Rose] should be cancelled and at the same time new or amended certificates should be issued * * * (R. 610).

At no point between the Commission's original statement of the issue and its ultimate finding does it refer to any specific act of inadvertence, error, or omission.

The best demonstration of the reasoning of the Commission is found in its report:

"* * * The facts leading to the issuance of the certificates in question are relatively simple, are not disputed, were set forth in some detail in the prior report, and have been reviewed briefly herein. As heretofore stated, division 5, after formal hearings, authorized the Transportation Company to purchase the operating rights heretofore described, but in each instance, however, 'the approval was made subject to a definite proviso reserving' the right to impose such limitations or restrictions as we might find necessary in order to insure that the service performed 'shall be auxiliary or supplementary to the train service' of the Railroad. Except with respect to the certificate issued in [Bennett], none of the certificates contain such a limitation. The Transportation Company points out, and correctly so, that in each of the proceedings included herein except in [Bennett], a so-called compliance order was issued by division 5 in each such proceeding shortly after the authorized purchase had been consummated" (R. 600-601).

"* * * These compliance orders do not contain the above-described limitation, * * *, which was contained in the findings in each of the finance proceedings" (R. 601).

"* * * The limitation, however, was specifically included in the findings in each of the finance proceed-

ings wherein the division authorized the Transportation Company to purchase certain motor-carrier rights. Thus, the error, if it be an error, occurred first in the compliance orders. The certificates issued in each of the five proceedings merely followed the compliance orders and do not include the limitation" (R. 602).

"* * * In other words, each of the compliance orders and of necessity the certificates based thereon authorized operations greater than those for the performance of which the division authorized the purchase.

"We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. **To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued.** Under these circumstances the certificates may be revoked, and certificates in accord with such findings issued, without proceeding in accordance with the provisions of section 212 (a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority is involved." (Emphasis added.) (R. 603-4.)

When the Commission's reasoning is analyzed it becomes apparent that only two isolated facts are the basis of the finding (or conclusion) of inadvertence: (1) that in each of the finance proceedings the report of Division 5 contained a specific reservation of the power to limit the service to be performed to that which was auxiliary to and supplementary of the train service of the railroad and (2) that a similar reservation did not appear in the cer-

tificate as finally issued. From these two facts alone the Commission makes an inference (which is, in fact, patent speculation) that the certificates were inadvertently issued.

As the above will indicate, except for its statement that "Thus the error, if it be an error, occurred first in the compliance orders" (R. 602) the Commission makes no attempt to determine how or why the certificates in question were issued containing the alleged error. Nor is there any reference in the entire report to evidence concerning the process of issuing certificates.

The only evidence relating to events which occurred between the finance reports and the issuance of certificates was contained in the testimony of Witness Bryant (R. 259), who was offered by appellee in support of its motion for discontinuance of the proceedings before the Commission.

Bryant's testimony was based upon seven exhibits, six of which were devoted to the recapitulation of various documents pertaining to the issuance of the certificate in each of the six segments of appellee's operation which were reopened by the Commission. Exhibits 10-A, 12-A, 13-A and 14-A covered the segments involved in these appeals.

Each of these exhibits showed that the Commission advised appellee that the purchases were approved (R. 410, 434, 454) and that appellee should adopt the vendors' tariffs (R. 413, 434, 449, 463). Notices were filed by appellee adopting the vendors' tariffs in each case (R. 406, 436, 448, 465). It should be noted that in each instance the tariffs which were adopted by this act provided for motor carrier service directly for the public. Throughout all of the correspondence with the Commission no mention was ever made of any restrictions or limitations upon the

rights which appellee was acquiring and undertaking to operate.

Each of these exhibits also contained copies of the "compliance orders"[11] (Hamm—Exhibit 10-A, R. 411-13; Cooper—Exhibit 12-A, R. 441-3; Parker—Exhibit 13-A, R. 455-7; Tolson—Exhibit 14-A, R. 475-7). The compliance orders provided that upon compliance with certain sections of the Act (dealing with tariffs, insurance, etc.) certificates of public convenience and necessity would be issued to appellee. The form of the certificates ordered to be issued by the compliance orders did not provide for any limitation or restriction upon the type of service authorized to be rendered by appellee.

Exhibit 16-A (R. 494) was a copy of the various certificates issued to appellee. This was all of the evidence ever introduced touching upon the issuance of the certificates.

The Commission's use of an inference that the certificates had been inadvertently issued was not the first time that such an inference had been used in this proceeding. Even before any hearing was held Examiner Waters reached a similar conclusion without the benefit of any of the evidence which was introduced at the only hearing in the reopened proceeding (R. 199). Examiners Croft and Simms (Simms was not present at the hearing) recom-

[11] A "compliance order" was a standard type of order generally in use in claimed grandfather cases under Section 206 at the time of appellee's original purchases, which provided that upon compliance by applicant with the provisions of Sections 215, 216 and 217, and with the rules and regulations issued under such sections "a certificate of public convenience and necessity shall be issued" to applicant. Such orders set forth in detail the commodities the applicant was authorized to carry, the routes over which it was authorized to carry the same, and any limitations or restrictions upon the service it was authorized to render.

If any interested party considered the "compliance order" to be in any respect incorrect, the standard practice was for that party to file a protest, see *Crescent Express Lines v. United States* (1943), 320 U. S. 401, 403. After a reasonable time, in the absence of protest from anyone, the certificate was issued.

mended that the Commission conclude that the certificates had been inadvertently issued (R. 532) in almost the identical language which was ultimately used by the entire Commission (R. 603). While this same language and reasoning appeared in the report of Division 5 of the Commission (R. 573), that Division apparently sensed the insufficiency of the evidence to support its conclusion and attempted to supply the deficiency by taking "official notice" of the administrative procedures and practices of the Commission (R. 572).

Although the entire Commission has abandoned this reasoning in its final report, the appellants in Nos. 16 and 19 still consider that it should be used (Brief No. 16, p. 34; Brief No. 19, pp. 23-24).

The attempted use by Division 5 of "official notice" is entirely improper and has been condemned by the courts. The statement of Division 5 is a perversion of the applicable rules of evidence relating to judicial or official notice. That a matter is judicially noticed means, merely, that it is taken as true without the necessity of offering of evidence by the party who should ordinarily have done so. This is because the courts assume that the matter is so notorious that it will not be disputed, but the opponent is not prevented from disputing the matter if he so desires (Wigmore on Evidence, 3rd Edition, Vol. IX, Sec. 2567, p. 535).

Judicial knowledge of a fact is measured by general knowledge of the same, and a fact is said to be generally recognized or known when its existence or operation is accepted by the public without qualification or contention (20 Am. Jur. 49). Such is not the case here, since the matters detailed in the report of Division 5 are not so notorious as to be indisputable, but are rather matters coming only within the personal official knowledge of the Commission and its staff members and may not unequivocally be taken as indisputable facts.

"(2) A special danger of the infraction of this fundamental rule is found in proceedings before **administrative officials—such as the Interstate Commerce Commission,** the Federal Trade Commission, and other administrative bodies listed ante, § 4c, where in their accumulated experience a certain amount of information lies hidden. It ought to be elementary, as it is fundamental, that they should make no use of relevant matters in their personal (supposed) knowledge, or in their official documents, without stating them and putting them into the record during the hearing. Otherwise, the party affected has no fair chance to test and, perhaps, dispute that supposed knowledge; nor is the appellate tribunal furnished with a dependable record. Yet the breach of this fundamental rule has been not infrequent." (Emphasis added.) Wigmore on Evidence, 3rd Edition, Vol. VI, Sec. 1805, p. 257.

The use of official notice in the manner in which it was done by Division 5 has been clearly condemned by this Court in **Ohio Bell Telephone Co. v. Commission** (1937), 301 U. S. 292, 300-305. There this Court held that even when official or judicial notice may properly be taken, it has no other effect than to relieve one of the parties of the burden of resorting to the usual forms of evidence and that where the use of judicial notice is taken after the case has been submitted, the doctrine is turned into a pretext for dispensing with a trial. The **Ohio Bell Telephone** case stands for the proposition that the use of judicial notice in the manner in which Division 5 attempted (and which the appellants support) here, violates the very rudiments of fair play assured to every litigant. If the Commission's report and order can only be supported upon the theory that Division 5 was correct in taking official notice of the administrative practices and procedures of the Commission, then it should be enjoined as violation of the due process clause of the 5th Amendment to the Constitution.

In **The Chicago Junction Case** (1924), 264 U. S. 258, 264, this court said: "Facts conceivably known to the Commission but not put in evidence will not support an order." See also **Interstate Commerce Commission v. L. & N. R. R. Co.** (1913), 227 U. S. 88, 93, and **U. S. v. Abilene & Sou. Ry. Co.** (1924), 265 U. S. 274, 288.

These principles not only condemn the use by Division 5 of "official notice," but also the attempted introduction by the Commission of Government Exhibits 1-8 at the hearing before the District Court (R. 29-39, 622-653).

(b) The evidence used by the Commission as a basis for its inference of inadvertence gives equal support to the inference that the unrestricted certificates were intentionally issued. Therefore, inadvertence was not established.

As demonstrated above, the Commission's finding that appellee's certificates were inadvertently issued has been based solely upon (1) the appearance of a reservation of the power to restrict in the various finance reports and (2) the non-appearance of that reservation in the certificates as finally issued. There has been no attempt to use any evidence as to what happened or did not happen between the rendition of the reports in the finance proceedings in 1938 and 1939 and the issuance of the certificates in 1942. Without such evidence, it was necessary to employ an inference to reach the finding of supposed inadvertence.

The two facts used by the Commission as a basis of its finding of inadvertence, when taken alone, as the Commission has done throughout this case, may be used not only to reach the inference of inadvertence, but can be used with equal validity to infer and thereby reach the conclusion that between the finance reports and the issuance of the certificates, the Commission, after deliberation, con-

cluded that the reservation to restrict should be omitted from the certificates.[12]

Both inferences, i. e. inadvertence on the one hand and an intentional omission on the other, are equally consistent with the facts used by the Commission. The arbitrary selection of one of two such inferences to the exclusion of the other violates basic rules of logic and reasoning. The error of logic committed by the Commission in arbitrarily selecting as its conclusion the inference that the certificates were inadvertently issued has been condemned by this Court.

In **Pennsylvania Railroad v. Chamberlain** (1933), 288 U. S. 333, this Court said:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover [citing cases]," l. c. 339.

While it is true that the **Chamberlain** case was passing upon the question of whether evidence was sufficient to submit a case to a jury, it has been held that the rules of logic and reasoning set forth in that case, which are necessary to the accomplishment of the type of adjudication guaranteed under our system of law, must be applied to the decisions of an administrative agency where the agency

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[12] The Brief of the Commission admits as much when it says:

> "With the passage of time since the issuance of the original compliance orders and certificates, we cannot tell whether the omission from the compliance orders and certificates of the reservation of power to impose conditions was a simple mistake or oversight on the part of the Commission employees involved, or whether, for example, they thought it unnecessary to restate the reservation in the compliance orders and certificates" (Brief No. 19, p. 25).

has acted as a trier of fact. **Cupples Co. v. N. L. R. B.** (C. A. 8, 1939), 106 F. 2d 100, 113-14.

Since a finding of the Interstate Commerce Commission must be supported by substantial evidence, the principles of logic set forth in the **Chamberlain** case should be applied to it as they have been applied to the National Labor Relations Board. Where proven facts give equal support to the two inconsistent inferences, neither of them is proven. Here, the facts used by the Commission do not prove inadvertence because they give at least equal support to the inference that the unrestricted certificates were intentionally issued after further consideration by the Commission. Therefore, neither inference is proven and the order of December 7, 1953 (R. 615-17), was invalid and the District Court properly enjoined it because the basic finding upon which it was based was not supported by evidence.

(c) Since there was positive, uncontradicted evidence that inadvertence did not exist, the Commission was not entitled to infer that the certificates were inadvertently issued.

The Commission states that if an error occurred, it occurred first in the "compliance orders" because the certificates issued merely followed the compliance orders (R. 602). No further reference is made by the Commission to the compliance orders. Actually the compliance orders negate the finding that the unrestricted certificates were inadvertently issued. It requires only a consideration of the compliance orders which were in evidence before the Commission[13] to see that these orders affirmatively establish that the certificates were not inadvertently issued.

Each of these orders begins with the phrase: "At a Session of the Interstate Commerce Commission, Division 5,

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[13] Hamm—Exhibit 10-A, R. 411-13; Cooper—Exhibit 12-A, R. 441-3; Parker—Exhibit 13-A, R. 455-7; Tolson—Exhibit 14-A, R. 475-7.

held at its office in Washington, D. C., on the 14th day of March, A. D. 1939." After stating the caption of each individual proceeding, the order continues: "This proceeding coming on for further consideration . . ." After reciting certain facts, the order proceeds: "[Upon compliance with the requirements of certain sections of the Motor Carrier Act] a certificate of public convenience and necessity shall be issued unless otherwise ordered authorizing [Frisco Transportation Company] to engage in interstate or foreign commerce as a common carrier by motor vehicles [according to the specifications set forth in the appendix of the order]." The appendix contains no restriction or reservation of the power to impose a restriction to "auxiliary or supplemental" service.

No evidence was introduced at the Kansas City hearing or at any other time to indicate that there was any defect, procedural or otherwise, in the compliance orders. The compliance orders, standing uncontradicted as they do and containing the language which they contain, establish that the unrestricted certificates were issued upon the basis of a valid order of the Commission which completely negatives any alleged administrative or clerical inadvertence. Likewise, there never has been an attack upon the validity or correctness of any compliance order involved in this proceeding by the Commission or any other interested party.

A positive indication that Division 5, in issuing the compliance orders in the Hamm and Cooper purchases, did not consider that the certificates authorized by such compliance orders were subject to the restrictions, now alleged to have been inadvertently omitted, is contained in the Division's report in a separate proceeding decided February 19, 1942, which involved the right of appellee to serve certain intermediate points between Treece, Kansas, and St. Louis, Missouri, over a route which included the routes covered by the Hamm-Cooper purchases. In discussing the rights which appellee already had, Division 5 said:

"By virtue of its acquisition of other 'grandfather' operating rights, Frisco has been granted certificates embracing the entire length of this route except that portion between Carthage and Springfield, Mo. Pursuant to authority granted in **Frisco Transp. Co.—Purchase—Hamm**, 15 M. C. C. 320, it purchased the operating rights claimed in 'grandfather' application No. MC-29652; it was renumbered No. MC-89913 (Sub No. 1), and by order therein, **entered March 14, 1939, Frisco was granted a certificate to operate between Miami, Okla., and Joplin, Mo., via Treece, serving all intermediate points.** Pursuant to authority granted in **Frisco Transp. Co.—Purchase—Cooper**, 15 M. C. C. 317, Frisco purchased the operating rights claimed in 'grandfather' application No. MC-20440; it was renumbered No. MC-89913 (Sub 3), and by **order therein, entered March 11, 1939, Frisco was granted a certificate to operate between Joplin and Carthage, serving Webb City and Carterville, Mo., as intermediate points.**" (Emphasis added.) **Ozark Truck Lines, Inc., Common Carrier Application**, 32 M. C. C. 459, 460. [This quotation was incorporated in Exhibits 10-A (R. 414) and 12-A (R. 444).]

Clearly, the Division had considered the compliance orders and made no mention of any restriction. Nor did it indicate any doubt that the rights possessed by appellee were unrestricted.

For a similar statement concerning appellee's rights over the Tolson segment, see the last paragraph on page 459 of Record, which is a quotation from a report of the Commission, decided October 30, 1942, covering an application by appellee for certain additional authority.

There are other positive uncontradicted facts which establish beyond question that the certificates were not inadvertently issued:

(1) The certificate, issued March 31, 1942, to cover Hamm and Cooper (Exhibit 16-A, R. 498-500) also covered operating rights issued as a result of the Ozark purchase, 35 M. C. C. 255. The orders in these cases provided that duplications should be eliminated. Since the Ozark rights overlapped both Hamm and Cooper, the preparation of the certificate required more than mere copying. Some administrative determination as to the elimination of duplications was necessarily made.

(2) The certificate, issued April 18, 1942, to cover Parker and Tolson (Exhibit 16, R. 501-03) also covered operating rights issued as a result of the Blake purchase, 35 M. C. C. 132. Here again the elimination of duplications required some administrative determination.

These facts bring the present case clearly within the second principle of logic set forth in **Pennsylvania Railroad v. Chamberlain** (supra), which this Court stated as follows:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. This conclusion results from a consideration of many decisions [citing cases]." l. c. 288 U. S. 340-41.

We think it is significant in this connection that at no point in the examiner's report, the report of Division 5, or in the report of the Commission on oral argument is there any specific finding that the compliance orders were "inadvertently issued." In view of the very purpose as well as the language of the compliance orders, such a finding

or theory of the case would be untenable because it must, of necessity, be based upon the premise that an order of the Commission which recites that it was entered "At a Session of the Interstate Commerce Commission," in fact, represents the decision of some person or persons other than the duly appointed commissioners.[14] The attempt by Division 5 of the Commission in its report (R. 572) to take judicial notice of administrative procedures and practices of the Commission would indicate that this may perhaps be the case.

We therefore submit that the finding of the Commission that the certificates were inadvertently issued was not supported by substantial evidence because "inadvertence" was inferred by the Commission solely from two facts which give at least equal support to an inference that the unrestricted certificates were intentionally issued upon a valid order of the Commission and for the further reason that the Commission was not entitled to infer that the certificates were inadvertently issued when there was positive, uncontradicted evidence which established that the certificates were issued as a result of further consideration by the Commission and valid orders (the compliance orders) directing the issuance of unrestricted certificates.

Because the order was not supported by substantial evidence the District Court was correct in enjoining its enforcement.

(d) **The District Court was justified in commenting that the evidence showed that no clerical error existed and that the Commission was attempting to limit the certificates in line with its present policy.**

The opinion of the District Court is a "two-barreled" condemnation of the report of the Commission. As a pri-

[14] It is interesting to note that all certificates begin with the phrase "At a Session of the Interstate Commerce Commission, Division 5, held * * *." (Exhibit 16-A, R. 495-6, 498, 501, 503, 505, 514.)

mary ground for its action the District Court found that the action of the Commission was contrary to Section 212 (a). This holding alone was sufficient to dispose of the case (R. 170). However, the District Court recognized its function to review the entire record and to cover the entire case in its opinion. It, therefore, proceeded upon the assumption that the Commission could enter the order without contravening of provisions of Section 212 (a) and considered the evidence. In this consideration of the evidence the District Court found that it could not approve the report and order of the Commission because there was not adequate evidence of the basic finding of inadvertence. In examining the evidence the District Court concluded two things: (1) That no clerical error existed and (2) that the Commission must have changed its policy if it had now decided to restrict appellee's certificates.

The Interstate Commerce Commission challenges this latter comment. It should first be noted that this comment was not included in the District Court's findings of fact and conclusions of law. It was not one of the two specific reasons advanced by the District Court for enjoining the order of the Commission.

However, there were many facts of record which could easily furnish a basis for the comment made by the District Court, not the least of which is the fact that the Commission's action affects four crucial segments located in the center of appellee's two main lines of operation and attempted to restrict them despite the fact that it had issued unrestricted certificates to appellee covering operations extending in both directions from the questioned certificates. The fact that this was not even started until four years after competing motor carriers had filed a complaint, which brought to the Commission's attention the unrestricted character of operations in which appellee was engaging, is at least indicative of a reversal of policy by the Commission. As the excerpts from Commission decisions which

were made a part of Exhibits 10-A-15-A, inclusive, demonstrate, the Commission had upon other occasions examined the operating rights held by appellee and showed no concern whatsoever over the unrestricted character of those operations.

It was undisputed facts such as those above noted which unquestionably brought forth the District Court's comment which we submit it was entitled to make. That this comment was not a basis of its decision is readily apparent from findings of fact and conclusions of law.

CONCLUSION.

The District Court correctly found that the order of the Interstate Commerce Commission violated Section 212 (a) of the Interstate Commerce Act, and was not supported by adequate evidence. For the reasons above stated, none of the appellants has demonstrated that the District Court committed any error. Therefore, the judgment below should be affirmed.

Respectfully submitted,

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Certificate of Service.

I, Ernest D. Grinnell, Jr., one of the attorneys for appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 23rd day of September, 1958, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with proper postage prepaid, to Wayne H. Bigler, Assistant United States Attorney, U. S. Court House, St. Louis, Mo., and to The Solicitor General and Maurice A. Fitzgerald, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with proper postage prepaid, to Robert Ginnane, its General Counsel, at the offices of the Commission, Washington 25, D. C., and to Charlie H. Johns, Jr., its Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the Railway Labor Executives' Assn. et al., by mailing copies in duly addressed envelopes, with proper postage prepaid, to James L. Highsaw, Jr., and Edward J. Hickey, Jr., 620 Tower Building, Washington, D. C., to Carroll J. Donohue, 506 Olive Street, St. Louis 1, Missouri, and to Clarence M. Mulholland, 741 National Bank Building, Toledo 4, Ohio.

4. On the American Trucking Associations, Inc., et al., by mailing copies in duly addressed envelopes, with proper postage prepaid, to Gregory M. Rebman, 1230 Boatmen's Bank Bldg., 314 North Broadway, St. Louis 2, Mo.; to Wentworth E. Griffin, 1012 Baltimore Street, Kansas City, Mo., and to Peter T. Beardsley, 1424 Sixteenth St., N. W., Washington 6, D. C.

Ernest D. Grinnell, Jr.

APPENDIX A.

Statutes Involved.

INTERSTATE COMMERCE ACT (49 U. S. C. 1 *et seq.*)

Section 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

Section 5 (2) (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant

or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Sec. 212 (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful

order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Section 213 (a) (1) [49 U. S. C., Section 313 (a) (1)]. Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice as is required by section 205 (f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public

interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing, such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier as defined in section 1 (3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5 (8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest by enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

APPENDIX B.

Principal Acquisitions of Operating Rights by Frisco Transportation Company.

Frisco Transportation Company—Purchase—John Hamm, 15 M. C. C. 320.

Frisco Transportation Company—Purchase—Joseph D. Cooper, 15 M. C. C. 317.

Frisco Transportation Company—Purchase—Joseph W. Parker, 25 M. C. C. 96.

Frisco Transportation Company—Purchase—Louis Tolson, 25 M. C. C. 96.

Frisco Transportation Company—Purchase—J. A. Rose, 15 M. C. C. 323.

Frisco Transportation Company—Purchase—T. N. Bennett, 35 M. C. C. 802.

Frisco Transportation Company—Purchase—C. F. Reddish, 35 M. C. C. 132.

Frisco Transportation Company—Purchase—Keystone Freight Lines, 39 M. C. C. 802.

Frisco Transportation Company—Purchase—Luper Transportation Company, 39 M. C. C. 813.

Frisco Transportation Company—Purchase—Mrs. B. T. Blake, 35 M. C. C. 132.

Frisco Transportation Company—Purchase—Ozark Truck Lines, Inc., 35 M. C. C. 255.

Frisco Transportation Company—Purchase—Powell Bros. Truck Lines, Inc., 39 M. C. C. 809.

Frisco Transportation Company—Purchase—William B. Mayers, 38 M. C. C. 820.

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No. 19

(Consolidated with Nos. 15 and 16)

10

In the Supreme Court of the United States

October Term, 1958

Interstate Commerce Commission, Appellant

v.

Florida Transportation Company, Appellee

On Appeal from the United States District Court for the Eastern District of Missouri—Eastern Division

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Brief for the Interstate Commerce Commission

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August 25, 1958.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 19

(Consolidated with Nos. 15 and 17)

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FRISCO TRANSPORTATION COMPANY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI—EASTERN DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinions (both majority and dissenting) of the United States District Court for the Eastern District of Missouri (R. 163-175) are reported at 153 F. Supp. 572. The reports of the Interstate Commerce Commission (R. 559-587, and 593-615) are found at 53 M.C.C. 415 (report of Division 5) and 62 M.C.C. 367 (report of the entire Commission).

JURISDICTION

The judgment of the district court (R. 175) was filed on August 12, 1957, and separate notices of appeal were filed on October 4, 8 and 10, 1957 (R. 187, 188, 192). The jurisdiction of this Court rests upon 28 U.S.C. 1253 and 2101(b), and is sustained by the following decisions: *United States* v. *Rock Island Co.*, 340 U.S. 419, and *United States* v. *Texas & Pacific Co.*, 340 U.S. 450, rehearings denied 341 U.S. 906. Probable jurisdiction of the appeals was noted on February 3, 1958; and they were consolidated for oral argument (R. 195).

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

QUESTIONS PRESENTED

Pursuant to Section 213(a)(1) (now in Section 5(2)(b), (49 U.S.C. 5(2)(b)), of the Interstate Commerce Act the Commission authorized the wholly-owned subsidiary of a railroad to purchase the operating rights of several motor carriers. Each of the Commission's reports authorizing such purchases stated that the approval was "subject to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad, * * *." (R. 629) Thereafter, the Commission issued to such subsidiary motor carrier certificates of public convenience and necessity which did not contain the reservation of power to impose restrictions. The questions presented are:

1. Whether the Commission was empowered, after notice and hearing, to modify the certificates to include restrictions in accordance with the reservations in its reports.

2. Whether the District Court erred in holding that the Commission's action was for the purpose of reflecting a change in policy rather than of correcting an error.

STATEMENT

Appellee, a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company, obtained its initial motor carrier operating authority in 1939 by purchasing, with Commission approval, the operating rights of existing motor carriers. Although in each of the four[1] Commission proceedings here involved appellee indicated its desire to perform not only a coordinated rail-truck service but also an all-motor carrier service independent of the railroad, the Commission, Division 5, stated in each report that its approval of the purchase was "subject to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad, * * *." (R. 602, 563-567)

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[1] 15 M.C.C. 317, 15 M.C.C. 320 and 25 M.C.C. 96. There were two other purchases involved in the proceeding before the Commission. In one (the Rose purchase), the Commission, for reasons stated in its report (R. 606-607) decided that no restriction should be imposed. In the other (the Bennett purchase), the reservation had been placed in the certificate and the court below, following the decision of this Court in the *Rock Island* case, *supra*, held that the Commission had the power to impose the specific restrictions. (R. 165) Those two purchases are therefore not dealt with in this brief.

Appellee took no exception to the reports, but notified[2] the Commission that it would consummate the approved purchases subject to the terms prescribed. Appellee consummated the transactions and commenced operations within approximately 30 days of the date of each report (R. 399, 406, 437 and 466).

Thereafter, so-called "compliance orders" were issued (R. 411, 441, 456 and 475). Those orders directed the issuance of the certificates upon compliance by the carrier within a stated period of time with statutory and regulatory requirements as to security for the protection of the public and publication of tariffs. See *Crescent Express Lines* v. *United States*, 320 U.S. 401, 404, fn. 2. Since at the time of the issuance of those orders appellee was already operating, their primary use was for record keeping purposes. In the preparation of the compliance orders, the Commission's Section of Certificates omitted the above-quoted reservation as prescribed in the Commission's reports. The two certificates, prepared from the compliance orders, likewise omitted the reservation. (R. 602).

Prior to the issuance of the certificates, several motor carriers filed a formal complaint with the Commission alleging that appellee was performing a motor carrier service independent of the rail service. A hearing was held upon that complaint,[3] and resulted in the reopen-

[2] The notifications were by letters which were filed in the correspondence section of the official record in each of the finance proceedings. Certified copies thereof were submitted to the court as part of the record. The court held, incorrectly we believe, that the correspondence (and certain inter-office communications filed in the public dockets) was not admissible but stated that consideration of the documents would not change the decision. (R. 186, 623-653).

[3] The Commission reports on the hearings are published as *Campbell Sixty-Six Express, Inc.* v. *Frisco Trans. Co.*, 43 M.C.C. 641 and 46 M.C.C. 222.

ing of the purchase proceedings "for the purpose of determining what, if any, conditions or restrictions should be imposed in the certificates in question so as to remove all doubt as to the character of operations which the Transportation Company had been authorized to acquire and in which it is authorized to engage." 43 M.C.C., at 653. (R. 560).

In the first report in that proceeding (the *Campbell* case) the Commission, Division 5, stated that Frisco was not authorized to, and did not, acquire the right to perform a motor carrier service independent of the operation of the railroad, and that such service should be discontinued. 43 M.C.C., at 653. However, on reconsideration, the entire Commission stated that since certificates were outstanding, the issue in that proceeding was whether Frisco was operating in violation of the terms of the certificates. 46 M.C.C., at 224. Since the certificates contained no restriction, the Commission found that Frisco had not conducted operations beyond the scope of the certificates.[4] 46 M.C.C. 226. The Commission added, however, that its decision should not be taken as an indication that the certificates could not be corrected to reflect the *intent* of the findings in the purchase proceedings. (R. 598).

In the reopened purchase proceedings, after a hearing, the Commission concluded that the unrestricted certificates had been inadvertently issued, and that it had the power to correct them. The Commission accordingly ordered the issuance of new certificates containing, pursuant to the reservation of power, appropriate restrictions similar to those considered by this

[4] The Commission also held that Frisco had not violated any provision of the Act or any order or regulation. This finding was apparently based upon the fact that no *specific* restriction had been included in the finance reports approving the purchases.

Court in *United States* v. *Rock Island Co.*, 340 U.S. 419, 425-426.

The Commission's conclusion was based upon the view that due regard for the rights of all parties and for orderly administrative procedure requires that the terms of a certificate may not vary from those set forth in the report upon which it is based, absent some supplemental report or order specifically dealing with the problem. Thus the Commission stated (R. 603-604):

> It would neither be fair nor equitable to the parties to the proceeding or to the general public to permit any such change other than in the manner specified. There has not been any type of report or order modifying the findings in any of the finance proceedings * * *. The compliance order issued in each of the five proceedings sets forth the operating rights which the Transportation Company had been authorized to purchase, and in each instance omitted the limitation. In other words, each of the compliance orders and of necessity the certificates based thereon authorized operations greater than those for the performance of which the division authorized the purchase.
>
> We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. Under these

> circumstances the certificate may be revoked, and certificates in accord with such findings issued, without proceeding in accordance with the provisions of section 212(a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved.[5]

The lower court, relying solely upon *Watson Bros. Transp. Co.* v. *United States,* 132 F.Supp. 905, aff'd. 350 U.S. 927, held that the Commission's action was an attempt to revoke duly issued certificates contrary to Section 212(a) of the Interstate Commerce Act (49 U.S.C. 312(a)), and that the failure to include the reservation of power in the original certificates was not the result of clerical error. The court stated (R. 172):

> * * * we are of the opinion that the four certificates cannot be cancelled as a result of the hearing conducted by the Commission since it was not conducted under Section 212 of the Act * * *.
>
> * * * * *
>
> * * * What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such.

District Judge Moore, dissenting, stated that the *Watson* case was not controlling in a case involving a railroad-affiliated motor carrier because this Court had expressly reserved the question in the *Rock Island* case, *supra.* Judge Moore was also of the view that this

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[5] In its report, Division 5 set forth the internal procedures followed in issuing the certificates, pointing out that their preparation by personnel in the Section of Certificates involved ministerial duties only. (R. 572-573).

Court's summary affirmance in the *Watson* case was not on the inadvertence issue but rather on the lack of notice and hearing in that case. He was also convinced that the omission of the reservation from the initial certificates was, in fact, a clerical error. (R. 173-175).

SUMMARY OF ARGUMENT

I

A. Under Section 5(2)(b) (formerly Section 213-(a)(1)) of the Interstate Commerce Act, the Commission may not approve the acquisition of motor carrier operating rights by an affiliate of a railroad unless it finds that the transaction is not only in the public interest but "will enable such [railroad] carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." To carry out the objective of those required findings the Commission, in authorizing such an acquisition, may restrict the motor carrier operations by a railroad or its affiliate to those which are auxiliary and supplementary to the railroad's train service. *United States* v. *Rock Island Co., supra.* When the Commission authorizes unrestricted motor carrier operations by a railroad or its affiliate in "special circumstances", its action must be supported by appropriate findings. *American Trucking Ass'ns* v. *United States,* 355 U.S. 141. Since the Commission, in approving the purchases here under consideration, specifically stated in each report that its approval was "subject to such further limitations, restrictions or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad * * *", the summary issuance of the compliance orders and certificates omitting such reservation was error. Under such circum-

stances the Commission is not helpless, but has the power, similar to that exercised by the courts in correcting judgments, to correct such certificates so as to conform them to the findings required by law. The administration of the Act has illustrated repeatedly the practical necessity for the exercise of such a corrective power by the Commission.

B. The contention of appellee, adopted by the lower court, that Section 212(a) of the Act precludes the action which the Commission took in this case is without merit. That section, on its face, simply accords finality to properly issued certificates as the Commission long ago recognized in *Smith Bros. Revocation of Certificate,* 33 M.C.C. 465. That section is concerned only with defining and limiting the substantive grounds for which properly issued certificates or permits may be suspended, modified, or revoked. *United States* v. *Seatrain Lines,* 329 U.S. 424, 428-429. It was never intended to preclude the correction of errors, which, uncorrected, would impair the integrity of the Commission's decisional process.

Under appellee's contention, it would seem to follow that once a certificate has been issued, not even a reviewing court can set it aside. However, since the issuance of a certificate does not cut off judicial review (*American Trucking Ass'ns* v. *United States,* 326 U.S. 77), we submit that Section 212(a) embodies no policy which precludes the Commission from correcting its own obvious errors without awaiting judicial action.

II

The lower court's holding that "what the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a

claimed clerical error that does not exist to justify such" is erroneous both in law and in fact.

It is undisputed that neither the Commission nor any of its Divisions thereof ever specifically rescinded the finding containing the reservation of power to restrict —a condition upon which the purchases were authorized, and since the Commission did not, and indeed could not, delegate to members of the staff the power to issue compliance orders and certificates not in accord with its findings, the failure of members of the staff to properly perform their ministerial duties was an inadvertence.

Decisions of this Court recognize the importance of assuring that action taken in the name of the Commission truly reflects *its* will as the delegate of Congress. They fully support the proposition that no inadvertent or mistaken action of employees can supplant the Commission's decision as expressed in its published findings. Indeed the Act itself in Section 17(3) points to the importance which Congress attaches to official Commission action by providing that "Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested."

Contrary to the view of the lower court, the Commission's action in correcting the certificates was not to reflect a change in policy for as this Court stated in the *Rock Island* case, *supra*, "The Commission has continually evidenced, as indicated above, by opinion and certification its intention to have rail-owned motor carriers serve in auxiliary and supplemental capacity to the railroads." (340 U.S. at 442).

ARGUMENT

I

The Commission Is Empowered to Correct a Certificate of Public Convenience and Necessity, Authorizing a Rail Subsidiary to Engage in Motor Carrier Operations, to Conform It to the Commission's Findings in Authorizing Such Operations

This case involves the question of whether the Interstate Commerce Commission is empowered to correct motor carrier operating rights to restrict them in accordance with conditions contained in the Commission's report authorizing such motor carrier operations. The court below, with one judge dissenting, held that the Commission's action constituted an attempt to revoke or change certificates of public convenience and necessity not authorized by Section 212(a). In so holding, we submit that the court overlooked the basic issue of whether the Commission may correct such certificates to conform them to its findings which were the statutory prerequisites for its action.

A. *The Act, practical necessity, and administrative practice support the exercise of such a power of correction by the Commission*

This case arose out of the acquisition of motor carrier operating rights by a subsidiary of a railroad. Section 5(2)(b) (formerly Section 213(a)(1)) of the Interstate Commerce Act provides that such acquisitions may be authorized by the Commission if it finds that the proposed acquisition not only is in the public interest but "will enable such [railroad] carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

It is settled that to carry out the objective of these required findings the Commission, in authorizing such an acquisition, may restrict motor carrier operations by a railroad or its affiliate to those which are auxiliary and supplementary to the railroad's train service. *United States* v. *Rock Island Co., supra.* It is also settled that when the Commission authorizes unrestricted motor carrier operations by a railroad or its affiliate in "special circumstances," its action must be supported by appropriate findings and evidence. *American Trucking Ass'ns* v. *United States,* 355 U.S. 141, 152.

The Commission's action, therefore, in authorizing a rail affiliate to engage in motor carrier operations and in defining the scope of such operations, falls into the category of Commission actions which must be supported by appropriate findings. Where such findings are lacking, the courts will set aside the Commission's orders.

Where a railroad or its affiliate seeks the Commission's approval under Section 5(2)(b) of an acquisition of an existing motor carrier operation, the Commission usually acts only after a hearing in which competing motor carriers and other interested persons may participate. Such competing motor carriers have standing to obtain judicial review of an order of the Commission approving such an acquisition.

Thus, this case involves the question of whether the Commission is barred from correcting certificates so as to conform its action to its findings required by law, or whether it is helpless to correct action beyond its findings which other parties are entitled to assume fairly delineate its decision.

We submit that the Commission possesses such power. It is the power of "every tribunal, judicial or

administrative", to protect the integrity of its proceedings by correcting errors. Davis, *Administrative Law*, (1951) p. 600. As this Court stated in *Gagnon* v. *United States*, 193 U.S. 451, 456:

> The power to amend its records, to correct mistakes of the clerk or other officer of the court, inadvertences of counsel, or to supply defects or omissions in the record, even after the lapse of the term, is inherent in courts of justice * * *.

This principle has been codified in Rule 60(a) of the Federal Rules of Civil Procedure, as follows:

> (a) *Clerical Mistakes.* Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

It is most unlikely that Congress created the Commission to give to transportation problems flexible and continuous treatment, but withheld from it the elementary power to correct "clerical mistakes" and "errors * * * arising from oversight or omission." To the contrary, such a power is clearly implied in the command of Section 17(3) that "The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Under this provision, the Commission is authorized, at the very least, to apply procedures which the courts have long found "conduce * * * to the ends of justice."

We assume that no one would challenge the power and duty of the Commission to correct obvious errors

in rate or finance orders. Thus, if it prescribed a rate of $1.50 per 100 pounds when it meant $.15, or if it authorized a carrier to issue securities in the amount of $10,000,000, when it meant $1,000,000, it surely may correct such orders to conform to its findings, or to use a hypothetical and extreme example, if a certificate was erroneously issued to carrier A rather than to carrier B, the Commission would have both the power and duty to take corrective action. Similar actual errors occur in the issuance of certificates and permits.

Thus, in *Greyhound Corporation, Extension, Slidell, Louisiana*, 47 M.C.C. 103 (1947), no exceptions had been filed to the examiner's report and order recommending the granting of new authority to the motor carrier and the order accordingly became that of the Commission. A notice to that effect was served upon the parties on September 20, 1946, and thereafter the certificate was issued. However, immediately after service of the examiner's report and order, a petition for leave to intervene and to file a petition for further hearing was filed. The petition was allowed by order of August 30, 1946. In passing upon the merits of the petition the Commission noted that the certificate had already been issued but stated that the acceptance of the petition for filing prior to the issuance of the certificate had the effect of keeping the proceeding open and that the issuance of the certificate was therefore through inadvertence which the Commission could correct. Also see *Santa Fe Trail Transp. Co. Extension*, 46 M.C.C. 775; *Petroleum Carrier Corp.* v. *Black*, 51 M.C.C. 717; and *Kenosha Auto Transport Corp.; Interpretation of Certificates*, 53 M.C.C. 85.

In the *Kenosha Auto* case, *supra*, a certificate was issued to Kenosha, embracing operating rights theretofore included in different certificates. The consolidated certificate authorized Kenosha "to perform through service" under a combination of two of the authorities theretofore covered by separate certificates. Upon petition of a competing carrier, the Commission issued to Kenosha a corrected certificate which eliminated the authority to render through service by tacking the two separate operating rights. Later, upon further consideration of the matter, the Commission set aside and vacated the "corrected certificate" and held a hearing on the competing carrier's petition. In its final report the Commission concluded that since Kenosha had not shown that public convenience and necessity required the through service and the findings did not authorize such service, the certificate "cannot be said to be other than indavertently issued" and could be corrected.[6]

Similarly, in the administrative proceeding involved

[6] The Civil Aeronautics Board likewise holds that certificates issued by it under similar circumstances are inadvertently issued and may be corrected. Thus, in *Pan-Am Airways, North Atlantic Route*, 7 CAB 849, 852, that Agency stated:

> There is nothing to preclude an administrative agency from correcting by a *nunc pro tunc* action inadvertent errors made in putting into appropriate documentary form the decisions taken by such agency.* [Footnote cites the *Seatrain* case, 329 U.S. 424] To rule otherwise would be in substance to legalize the retention of money or property paid under mistake. For a franchise for unlimited service from Washington and Boston to Bermuda is a matter of considerable monetary value to Pan American and may involve, through the necessity of mail pay, considerable financial loss to the Government—to say nothing of impairing the value of a franchise granted to another carrier, Colonial Airlines, for one of these routes, after considerable and painstaking scrutiny by the Board.

in the *Watson* case, *supra,* (Watson Bros. Transportation Co., Inc. Omaha, Nebraska, Docket No. MC 70451) hereinafter discussed in more detail, the Commission authorized the issuance of a certificate allowing Watson to transport explosives on all routes over which it was authorized to transport general commodities and to four ordnance plants at which no other motor carrier service was authorized. The certificate as drafted and issued contained authority to transport not only explosives but also general commodities to the four plants, even though Watson had not requested such authority nor had the Commission found that public convenience and necessity required such service. The Commission entered an order correcting Watson's certificate.

And in *Tompkins Motor Lines, Inc.* v. *United States, et al.,* Civil Action No. 2436, Middle District of Tennessee, Nashville Division (filed October 17, 1957), discussed in the Commission's reply to the motion to affirm, complaint was made that in the course of clarifying a certificate of public convenience and necessity issued by the Commission to a competing motor carrier, the Commission in 1952 had granted, without notice to the plaintiff or other competitors, certain operating authority which had not been requested by the applicant and which was not supported by evidence of public convenience and necessity. By action taken on December 20, 1957, the Commission, subject to the court's action on this appeal, reopened the application proceeding for a hearing to determine whether, through error or mistake, it had issued a certificate broader than its findings and the supporting evidence. Subsequently, the holder of the questioned operating authority asked the Commission to revoke the questioned portions of its operating authority, and this correction was effected by

the Commission's order of May 9, 1958. Upon presentation of these facts to the District Court, the civil action was dismissed as moot.

The question of the Commission's power to correct errors in certificates has received little consideration by the courts. In *United States* v. *Seatrain Lines*, 329 U.S. 424, 428-429 (1947), this Court stated that "We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded * * * that the issuance of the original certificate was not an 'inadvertent' error which the Commission's subsequent action was intended to correct." Nor was the question resolved in the *Rock Island* case, *supra*, in which this Court sustained the Commission's action in imposing auxiliary and supplementary service restrictions in a motor carrier certificate (the Frederickson route) issued to a railroad. In that case, the Commission's report and order authorizing the purchase made no reference to such restrictions, but an unrestricted certificate had not been issued. The Court added that—

> "This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. * * *

In the instant case, by contrast, the Commission's reports prescribed a reservation of power to impose such restrictions, but neither the compliance orders nor the certificates contained such a reservation of power.

While three-judge district courts have considered the question, the results are uncertain. In *Riss & Co.* v. *United States*, 100 F. Supp. 468, 474 (W.D. Mo., 1951), affirmed 342 U.S. 937, rehearing denied 343 U.S. 937, the three-judge court, in holding that an alleged variation between a certificate and the Commission's order authorizing issuance of the certificate must first be called to the attention of the Commission, stated that "The Commission has authority to correct its errors if there were errors."

Next was the *Watson* case, *supra,* involving a motor carrier certificate which authorized the transportation of general commodities, rather than merely explosives as sought by the carrier. In setting aside the Commission's order (*supra,* p. 16), the three-judge court, with Circuit Judge Johnsen dissenting, concluded that—

> Even if the court were to assume that the Commission has authority to correct clerical errors without notice and hearing, the result in this case would not be different, because it is the holding of the court that the order of August 25, 1953, is more than the mere correction of a clerical error; and is an attempt made contrary to Section 212 to revoke and change a certificate duly issued.

The *Watson* opinion, by its terms, is not a holding that the Commission lacks power to correct true errors in certificates. At the most, it suggests that the Commission may not correct an error in a certificate without notice and hearing. Thus, in *Jones Truck Lines, Inc.* v. *United States*, 146 F. Supp. 697, 703 (W.D. Ark., 1956), in which a three-judge court rejected the contention

that the Commission's interpretation of a certificate involved a revocation or modification within the meaning of Section 212(a), that court stated that "all the Watson case can be said to require in such circumstances, is that, to correct an error, the Commission must accord procedural due process and give notice and an opportunity to be heard.

It should be noted, however, that in the instant case the court below (with Judge Moore dissenting) apparently found a broader meaning in the *Watson* decision. Thus, it stated that *Watson* "clearly indicates that certificates duly issued cannot be modified in the manner sought to be modified in the case before us, even though some prior report of the Commission indicates to the contrary" (R. 168).

To summarize, we submit that the Commission, like a court, has inherent power to correct errors in orders or certificates which embody its official acts. Such an error exists wherever the terms of an order or certificate vary materially from the findings, based upon substantial evidence, which Congress has required as the basis for action by the Commission. The existence of such a power of correction is implicit not only in statutory provisions for hearings and findings, but also in the command of Section 17(3) that "The Commission shall conduct its proceedings * * * in such manner as will best conduce * * * to the ends of justice." Under this view, it is immaterial whether such an error is "clerical" or "inadvertent." However, we will show in Part II of this brief that the majority of the court below erred in concluding that the issuance of the certificates here involved did not involve clerical error.

B. *Section 212(a) of the Interstate Commerce Act does not deprive the Commission of power to correct errors in certificates*

Presumably, the appellee will renew its contention in the court below that Section 212(a) of the Act specifically precludes the action which the Commission took in this case. The contention is that such a correction of error in a certificate is *pro tanto* a revocation or modification which Section 212(a) prohibits except for wilful violations of law and after notice and hearing. We submit that the argument is without merit.

On its face, Section 212(a) simply accords finality to properly issued certificates, subject to suspension, modification or revocation for wilful violation of law. Thus, the first sentence of Section 212(a) provides that "Certificates, permits and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided." This provision is clearly intended to provide finality for properly issued certificates, as the Commission long ago recognized.[7] However, there is not the

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[7] *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, 472 (1942):

> "In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end

slightest reason to believe that by Section 212(a) Congress meant to make certificates immune from correction of errors, any more than it has intended its historic provisions for finality of judgments to deprive the courts of power to correct "clerical mistakes" and "errors * * * arising from oversight or omission."

Under the appellee's contention, it would seem to follow that once a certificate has been issued, not even a reviewing court can set aside the Commission's action as not supported by findings or evidence. However, since it is settled that the issuance of a certificate does not cut off judicial review of the Commission's action in authorizing its issuance (*American Trucking Ass'ns* v. *United States,* 326 U.S. 77) we submit that Section 212(a) embodies no policy which precludes the Commission from correcting its own obvious errors without awaiting judicial action.

Our construction of the first sentence of Section 212(a) finds strong support in the remainder of that subsection, which deals only with the suspension, modification, or revocation of motor carrier certificates and permits "for wilful failure to comply with any provision of this part, or with any lawful order, rule, or regu-

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of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. To hold that under section 208(a) we have the power to include in certificates self-executing forfeiture terms, conditions, or limitations would make section 212(a) merely surplusage and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the act.

"In expressing the views stated above, we do not desire to be understood as holding that a certificate obtained by fraud, or misrepresentation, or one issued in error by this Commission, may not be changed or revoked without proceeding under section 212(a). Here, there is no question of fraud, misrepresentation, or a certificate issued in error."

lation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit * * *." That is, Section 212(a) is concerned only with defining and limiting the substantive grounds for which certificates or permits may be suspended, modified, or revoked. It is intended to protect the holders of certificates and permits against subsequent changes in the Commission's licensing policies. *United States* v. *Seatrain Lines,* 329 U.S. at 428-433. It was never intended to preclude the correction of errors which, uncorrected, would impair the integrity of the Commission's decisional process.

This Court has already rejected the broad contention that every disagreement between the Commission and a carrier as to the proper scope of a certificate invokes the prohibitions of Section 212(a). Thus, in *Nelson, Inc.* v. *United States,* 355 U.S. 554, 558, fn. 4, in upholding the Commission's power to interpret a certificate, this Court noted that—

> It is true, of course, that limitations on Commission power to modify motor carrier permits, established in § 212(a) of the Act, cannot be bypassed under a guise of interpretative action. Commission interpretation of the meaning of a permit, being simply a definitive declaration of what rights existed from the very beginning under the permit, cannot be equated with modification, however, unless found to be clearly erroneous.

Similarly, in the instant case, the correction of certificates to conform to the Commission's findings is not an attempt to by-pass the limitations of Section 212(a).

II

The Court Below Erred in Holding that the Commission Action Was for the Purpose of Reflecting a Change in Policy Rather than of Correcting an Error

The majority of the court below concluded that the Commission's action reflected a change in its policy rather than the correction of errors in the certificates originally issued to appellee. Thus, that court stated that "What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such" (R. 172). We contend that this conclusion or finding is erroneous both in law and in fact.

We start with the fact that each of the Commission's reports authorizing issuance to Frisco of the certificates here involved stated that the Commission's approval under Section 5(2)(b) of Frisco's purchase of motor carrier operating rights was "subject to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad" (R. 602, 563-567). It is undisputed that neither the Commission nor any Division of the Commission ever specifically rescinded this statement of the condition upon which it approved the proposed purchases.

The procedure leading to the issuance of the compliance orders and certificates here involved was described as follows in the report of Division 5 in the instant proceeding (R. 572-573):

> We may, of course, take official notice of our administrative procedures and practices. The

preparation of certificates is a duty assigned to our Section of Certificates. Upon adoption, reports and orders approving the issuance of certificates automatically and routinely go to this section. After the lapse of the prescribed time for filing petitions, the clerical employees of this section having no discretionary authority insert on a form containing mimeographed stock paragraphs the authority described in the findings of the report, namely, the commodities (if the transportation of property is involved), the origin and destination, routes, and restrictions or conditions, if any. They are concerned only with the findings and not with the text of the report, and their sole function is to transpose the substance of the findings onto the certificate form, making such changes in language as may be required to conform to the wording customarily used in certificates. They have no authority to add to, or detract from, the findings or to make any change therein even though the text of the report should show a discrepancy. In the latter event, corrective action may be taken only by the Commission or a division thereof through a formal supplemental report, report on reconsideration, or a modifying order. In performing this clerical duty, the employees in question exercise no judgment, discretion, or interpretative power as to the character of authority being certificated other than to call to our attention any patent discrepancies they discover. Their drafting of the certificate is not reviewed except by a supervisor also without discretionary authority solely to insure a correct reflection of the findings.

While this discussion in the Division's report does not deal specifically with the issuance of compliance orders, it is a fact that they were prepared by the staff in the Section of Certificates as a preliminary step in the issuance of certificates covering rights claimed under the "grandfather" clause of the Motor Carrier Act.

The Commission has never delegated to its employees in the Section of Certificates, nor is it empowered to do so, the authority to issue a certificate which is not in accord with the Commission's findings authorizing the issuance. With the passage of time since the issuance of the original compliance orders and certificates, we cannot tell whether the omission from the compliance orders and certificates of the reservation of power to impose conditions was a simple mistake or oversight on the part of the Commission employees involved, or whether, for example, they thought it unnecessary to restate the reservation in the compliance orders and certificates. However, the distinction is immaterial, since the failure to conform the certificates to the Commission's findings was inadvertence from the Commission's point of view.

It is settled in the decisions of this Court that neither a member nor an employee of the Commission may modify the effect of the Commission's decisions, or otherwise bind the Commission contrary to law. In *Minneapolis & St. L. R. Co.* v. *Peoria & P.U. Ry. Co.*, 270 U.S. 580, 585, this Court held that a telegram from a Commissioner stating that an order of the Commission dismissing a complaint did not rescind an earlier order based upon the complaint, "was without legal significance." Similarly, in *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 146, the Secretary of the Commission was held to be "without authority to bind the

Commission" on questions relating to its jurisdiction. We submit that these decisions recognize the importance of assuring that actions taken in the name of the Commission truly reflect *its* will as the delegate of Congress. They fully support the proposition that no inadvertent or mistaken action of employees of the Commission can supplant the Commission's decision as expressed in its published findings.[8]

In any event, we do not understand the court below to have based its view that the Commission's action was a change of policy rather than the correction of error, upon the notion that employees of the Commission may modify its decisions. Rather, that court concluded (R. 171) that the Commission had changed its policy in that—

> Months after the approval of the finance report by a divided division, compliance orders were issued for the four routes. Thereafter, a certificate was issued for the Bennett route containing restrictions. A complaint was filed by competing carriers, complaining that the plaintiff was ignoring the restrictions of the finance hearing report, but thereafter the four certificates were issued. In the face of all of this, the Commission would have us believe that the purported changes are made as the result of clerical error.

To begin with, the issuance of the Bennett certificate containing a reservation of power to impose future

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[8] The importance which Congress attaches to this point is illustrated by the provision of Section 17 (3) that—

> Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested.

conditions (R. 504) shows no more than that in 1940 the Commission was already committed to the policy of limiting motor carrier operations by a railroad to service auxiliary and supplementary to the rail service, except in unusual circumstances. The issuance in 1942 of the certificates here involved without such an express reservation, despite the pendency of the complaint filed in July 1941 by competing motor carriers (the *Campbell Sixty-Six Express* proceeding), simply does not support the inference of a change in policy. For example, in December 1941, there was issued to Rock Island Motor Transit Company the certificate containing such a reservation of power, which was involved in the *Rock Island case, supra,* 340 U.S. 419, 423. Indeed, in that case, this Court has already rejected the contention that the policy of the Commission had changed, by concluding, after a review of Commission decisions, that "The Commission has continually evidenced, as indicated above, by opinion and certification its intention to have rail-owned motor carrjers serve in auxiliary and supplemental capacity to the railroads." (340 U.S. at 442).[9]

With all respect, we do not understand the inference which the court below draws from the fact that the Commission's hearing examiner, in the proceedings which led to the Commission's approval of the four acquisitions here involved, recommended approval sub-

[9] Moreover, if the members of Division 5 after issuance of the reports and orders in the original purchase proceedings and prior to the issuance of the compliance orders and certificates had changed their minds concerning the imposition of the reservation of power to restrict and authorized its omission from those documents, their later conclusion in the *Campbell* case that the all-motor carrier service of Frisco was unauthorized, was strangely inconsistent.

ject to a reservation of power to impose limitations. Thus, that court stated variously (R. 171, 172) that—

> The report of the finance hearing examiner as to the four routes was adopted by a divided division of the Commission, with one dissent. Who would say that the Commission is bound by the recommendations of the hearing examiner? The books are full of cases where the recommendations of the hearing examiners have not been followed, and yet the certificates are not the result of clerical errors. The Commission is not a rubber stamp for the conclusions of hearing examiners.
>
> * * * * *
>
> * * * We would not overrule the actions of the Commission taken at the time that the compliance orders were issued, and the certificates were issued merely because the hearing examiner at the finance hearings would have put limitations on the certificates. For us to hold that the members of the Interstate Commerce Commission are bound by the recommendation of a hearing examiner in his report, a report that was adopted by a divided division, would be to hold that the members of the Commission could not have minds of their own.

These four acquisitions were authorized in three reports of the Commission's Division 5, as follows: 15 M.C.C. 317 (Cooper); 15 M.C.C. 320 (Hamm); and 25 M.C.C. 96 (Parker and Tolson). In the Cooper and Hamm proceedings, Division 5 issued reports (separate and distinct from the hearing examiners' reports) authorizing those acquisitions subject to a reservation

of power to impose further limitations. In Parker and Tolson, the report of Division 5 states that "In our opinion the examiner has adequately treated the foregoing matter, as well as other arguments repeated upon exceptions, and we adopt the following"; this was followed by the text of the examiner's report, which contained the reservation of power to impose further limitations. It is absolutely clear that Division 5, not the hearing examiner, authorized the four acquisitions subject to such a reservation of power, and that there is no basis for speculation as to whether Division 5 was "bound" by the examiners' recommendations.

Similarly, the fact (referred to repeatedly by the court below) that Commissioner Rogers dissented in all three proceedings, is completely irrelevant, particularly since he did not state the reasons for his dissent and therefore may have been of the view that the applications should have been denied *in toto*.

To summarize, we submit that, for the reasons set forth earlier in this brief, there is a strong presumption that Commission action inconsistent with its findings as required by law is the result of clerical error or mistake. There is no basis in law or in fact for the contrary conclusion of the court below that the issuance of the certificates without the reservation required by the Commission's findings was the result of the Commission's policy at that time which it is now attempting to reverse.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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AUGUST 25, 1958.

APPENDIX

Statute Involved

Interstate Commerce Act (49 U. S. C. 1 *et seq.*):

SEC. 5 (2). (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *

SEC. 5 (2). (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard.

If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

SEC. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part,

for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

SEC. 213. (a) (1) [49 U. S. C. Section 313 (a) (1)] Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice

as is required by section 205 (f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing, such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier as defined in section 1 (3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5 (8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest, enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~654~~ 76

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants;

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY,
Appellee.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

JURISDICTIONAL STATEMENT

Appellants, the Railway Labor Executives' Association, the Brotherhood of Railway Trainmen, and the Order of Railway Conductors and Brakemen appeal from the judgment of the United States District Court for the Eastern District of Missouri, Eastern Division, entered on August 12, 1956, insofar as said judgment enjoins the United States of America and the Interstate Commerce Commission from enforcing the second ordering paragraph of the Commission's order of December 7, 1953, entered in a proceeding bearing the principal caption MC 89913, Sub. No. 1, *Frisco Trans-*

portation Company Extension—Joplin—Miami, and sets aside, suspends, and annuls said paragraph of that agency order. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court is reported at 153 F. Supp. 572, and is attached hereto as Appendix B. The judgment, findings of fact, and conclusions of law of said Court are attached hereto as Appendix C. The opinion of the Interstate Commerce Commission is reported at 62 M.C.C. 367. The orders of the Commission are unreported. The Commission's opinion and orders are attached as Appendix D.

JURISDICTION

The Complaint was filed in the District Court on May 20, 1955, by Frisco Transportation Company under the Fifth Amendment of the Constitution of the United States, Sections 7, 8, and 10 of the Administrative Procedure Act [5 U.S.C. 1006, 1007, and 1009], Sections 1336, 1398, 2284, and 2321-2325 of the Judicial Code [28 U.S.C. 1336, 1398, 2284, and 2321-2325], and the Interstate Commerce Act [49 U.S.C. 1, et seq.], and asked the Court to enjoin, set aside, suspend, and annul an order of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding in Commission Docket No. MC 89913, Sub. No. 1, identified as *Frisco Transportation Company Extension—Joplin—Miami.* The United States was made the defendant pursuant to Section 2322 of the Judicial Code [28 U.S.C. 2322]. Appellants filed a motion to intervene

as parties defendant in said action pursuant to Sections 17(11) and 205(g) of the Interstate Commerce Act [49 U.S.C. 17(11) and 305(g)], Section 2323 of the Judicial Code [28 U.S.C. 2323], and Rule 24 of the Federal Rules of Civil Procedure, which was granted by the District Court on March 15, 1956. Thereafter, appellants filed an answer to the Complaint.

The judgment of the District Court was entered on August 12, 1957, and notice of appeal was filed in that Court on October 8, 1957. The jurisdiction of the Supreme Court to review this judgment by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code [28 U.S.C. 1253 and 2101(b)]. Such jurisdiction is sustained by the decisions in *United States* v. *Texas & Pacific Motor Transit Co.*, 340 U.S. 450 (1951); *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1946).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Does the Interstate Commerce Commission have authority, after notice and hearing, to impose conditions on motor carrier certificates of a wholly-owned subsidiary of a railroad for the purpose of insuring that the operations of the subsidiary are auxiliary to or supplemental of the parent railroad's train service under circumstances where:

(a) the operating rights represented by said certificates were acquired by the purchase of independent motor carriers subject to the approval of the Interstate Commerce Commission under Section 213 [now Section 5(2)] of the Interstate Commerce Act, which permits agency approval of such a purchase only upon a finding that the parent railroad can use the motor

carrier service to public advantage in its own operations;

(b) the Commission based its findings in the acquisition proceedings under said section that the requirements of the statute were met on the ground that applicant Frisco Transportation Company proposed to use the purchased operating authority to provide a coordinated rail-truck service;

(c) the Commission included in its reports approving the purchases the provision that the authority granted was subject to such further limitations or restrictions as the agency might thereafter find necessary to impose to insure that the motor service involved be auxiliary to or supplemental of the train service of the parent railroad; and

(d) the reservation of authority made in the reports approving the purchases was not inserted in the certificates issued pursuant thereto.

2. If Question 1 is answered in the negative, the further question is presented as to whether the Commission has authority under the circumstances enumerated in paragraph 1 above to impose conditions upon the certificates of a motor carrier subsidiary of a railroad in order to insure that operations thereunder be auxiliary to or supplemental of the parent railroad's train service upon finding, after notice and hearing, that the reservation of authority to subject the certificates to further limitations or restrictions contained in its reports approving the purchases of the routes covered by the certificates was *inadvertently* omitted from the certificates themselves.

3. If Question 2 is answered affirmatively, a further question is presented as to whether there was adequate

evidence to support the Commission's finding that the reservation of authority to impose further limitations or restrictions upon the motor carrier certificates involved in order to insure that operations thereunder be auxiliary to or supplemental of the parent railroad's train service was omitted from the certificates through error.

STATUTES INVOLVED

This appeal primarily involves the National Transportation Policy [49 U.S.C., preceding Sec. 1], and Section 5(2)(b), Section 212(a), and former Section 213(a)(1) of the Interstate Commerce Act [49 U.S.C. 5(2)(b) and 312(a)(1)]. These statutory provisions are set forth in full in Appendix A hereto.

STATEMENT

The order of the Interstate Commerce Commission which was the subject of the Complaint in the District Court amended certificates of the Frisco Transportation Company hereinafter called "the Transportation Company"), a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company (hereinafter called "the Railroad"), covering five segments of Transportation Company's routes so as to impose the following limitations upon operations over those segments (Appendix D, 56a and 57a):

> 1. The service to be performed by the Frisco Transportation Company, hereinafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, except that this condition shall not apply with respect to Dyess, Arkansas.

2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Memphis, Tenn., and Amory-Tupelo (considered as one), Miss.

4. All contractual arrangements between the Transportation Company and the railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the railway.

The segments involved were purchased by Transportation Company from prior operators and have been described throughout the litigation by the vendor's name. The segments are (1) the "Cooper" route between Joplin and Carthage, Missouri; (2) the "Hamm" route between Miami, Oklahoma, and Joplin, Missouri; (3) the "Tolson" route between Walnut Ridge, Arkansas, and Memphis, Tennessee; (4) the "Parker" route between Blytheville, Arkansas, and Memphis, Tennessee; and (5) the "Bennett" route between Blytheville and Lake City, Arkansas.

Transportation Company filed separate applications with the Commission for approval of each purchase pursuant to Section 213 of the Interstate Commerce Act [49 U.S.C. 313]. Paragraph (a)(1) of this section read as follows:[1]

> "Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice as is required by section 205(f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however, That if a carrier as defined in section 1(3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5(8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.*" (Italics supplied)

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[1] Section 213(a)(1) was repealed by the Transportation Act of 1940, Section 21(e) [54 Stat. 924], and the substance carried forward into Section 5(2)(b).

Transportation Company was and is the wholly-owned subsidiary of the Frisco Railroad, a carrier within the meaning of Section 1(3) of Part I of the Interstate Commerce Act [49 U.S.C. 1(3)]. (App. B, 6a) Consequently, the Commission could legally approve Transportation Company's purchase of the five segments involved only if the transactions met the test of the above quoted proviso in Section 213(a)(1). The Commission has long interpreted this proviso to limit acquisition of motor operations by railroads or railroad subsidiaries to those which are auxiliary to or supplemental of the railroad's train service. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 437 (1951); *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 5 M.C.C. 9, 11, 12 (1937). In acting upon Transportation Company's applications for approval of the proposed acquisitions, the Commission gave full effect to such restrictions on its authority.

In *Frisco Transportation Company—Purchase—Cooper*, 15 M.C.C. 317 (1938), the Commission (Div. 5) considered Transportation Company's application for approval to acquire the "Cooper" route. At page 318 of its report granting such approval, the Commission made the following finding:

> "The authority herein sought is desired to afford applicant and the railway means for developing coordinated rail truck service with a view toward retrieving some of the substantial volume of less-than-carload freight directed from the railway to competing highway carriers and to improve the railway's service to the public."

On the basis of this factual finding, the agency concluded that the purchase would enable the Railroad to use the motor service involved to public advantage in

its own operations (page 319). At the same time the Commission recognized that experience might give rise to the necessity for the future imposition of specific conditions to achieve the required statutory limitations upon Transportation Company's purchased authority. The agency therefore imposed the following condition upon its approval (page 319):

> "Provided that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary to or supplemental to the train service of said railway company."

The application of Transportation Company to acquire the "Hamm" route came before the Commission in *Frisco Transportation Company — Purchase — Hamm,* 15 M.C.C. 320 (1938). The Commission (Div. 5) made the identical findings as to Transportation Company's intent to operate a coordinated rail-truck service as it made in connection with the "Cooper" purchase, and on such basis concluded that the purchase of the "Hamm" route would meet the requirements of Section 213(a)(1)—(page 321). The Commission also conditioned its approval upon the same reservation of authority to impose future specific conditions upon the operation as the agency provided in the "Cooper" purchase (page 322.).

Transportation Company's application for approval of its purchase of the "Parker" and the "Tolson" routes came before the Commission (Div. 5) in *Frisco Transportation Company — Purchase — Joseph W. Parker,* 25 M.C.C. 96 (1939). At page 99 of its report approving the purchase, the Commission made the following finding as to the type of service which Trans-

portation Company proposed to operate if its purchase was approved:

> "Considerable evidence was offered showing the manner in which coordinated rail-truck service would be rendered similar in character to that described in *Frisco Transp. Co.-Purchase-Hamm, supra,* and many resulting benefits to the public are of record."

On this basis the Commission concluded that the purchase would meet the reguirements of Section 213(a)(1)—(page 100). It also imposed upon its approval of the purchase the identical reservation of authority to restrict the operation in the future as was placed upon its approval of the "Cooper" and "Hamm" purchases (page 100).

The application of Transportation Company to purchase the "Bennett" route came before the Commission (Div. 5) in *Frisco Transportation Company—Purchase—Bennett,* 35 M.C.C. 802 (1940). The agency without an opinion adopted the examiner's recommendation that it be approved and that authority be reserved to impose specific future conditions to insure an auxiliary or supplemental operation.

Transportation Company took no exceptions to the findings or conditional approvals of the Commission in the above cited acquisition proceedings and consummated the transactions pursuant to such approval.

Between March and July, 1939 "compliance orders" were issued by the Commission which set forth the authority to be embodied in the certificates to be issued to Transportation Company pursuant to the agency approval of the five purchases with the exception of the "Bennett" purchase. There was omitted from

these orders the reservation of authority contained in the Commission's reports approving the purchases to subject operations thereunder to such further limitations or restrictions as the Commission might find necessary to insure that the service be auxiliary to or supplemental of the Railroad's service. The certificates subsequently issued pursuant to these "compliance orders" also omitted this reservation of authority. (App. B, 7a) However, the certificate issued to Transportation Company covering the "Bennett" route did contain the reservation of authority (App. B, 9a).

In July, 1941, prior to issuance of the certificates, a group of nine motor carriers operating in the same area as Transportation Company filed a complaint with the Commission alleging that such carrier's operations violated the Interstate Commerce Act and agency orders. The burden of the complaint was that Transportation Company was performing a direct motor service in contravention of the conditions under which it was authorized to purchase its operating rights. (App. B, 9a) The complaint came before Division 5 of the Commission in *Campbell Sixty-Six Express, Inc., et al.* v. *Frisco Transportation Company, et al,* 43 M.C.C. 641. The Division made the following findings with respect to the operations of Transportation Company:

> 1. Transportation Company is engaged in performing an independent motor service of the same kind and character as is performed by motor carriers generally (page 647).
>
> 2. Transportation Company does not refute the claim that it is performing an independent motor service rather than a service strictly auxili-

ary to or supplementary of that of the Railroad (page 649).

3. Transportation Company's claim that its unrestricted service is beneficial is irrelevant since the issue before the Commission is whether the carrier has been authorized to perform only an auxiliary and supplemental service and whether it has performed such a service (page 649).

4. The acquisition of the Cooper, Hamm, Tolson, Parker, and Bennett routes by Transportation Company was authorized and approved in order for the carrier to perform auxiliary and supplemental service to that of the Railroad. Transportation Company was not authorized to perform direct motor carrier service and should discontinue to do so (page 653).

Division 5 stated that the acquisition proceedings would be reopened to determine what conditions should be imposed to insure that Transportation Company's operations be auxiliary to or supplemental of the Railroad's service (page 653).

Transportation Company appealed the Division 5 decision to the full Commission in *Campbell Sixty-Six Express, Inc., et al. v. Frisco Transportation Company, et al.*, 46 M.C.C. 223 (1946), which held that Transportation Company had not violated the terms of its certificates in its operations because the restrictions contained in the reports in the acquistion proceedings had been omitted from those certificates. The Commission stated, however, that its opinion did not mean that the certificates held by Transportation Company could not be corrected to reflect the intent of the findings in the acquisition proceedings or that restrictions could not now be imposed upon the Company's certificates which would have the effect of limiting service

thereunder to that which is auxiliary to or supplemental of the Railroad's train service (page 225). Nor did the Commission disagree with Division 5 as to the intent of the agency in approving the acquisitions to limit the purchased operations to those which were auxiliary to or supplemental of the Railroad's train service.

Thereafter, on January 4, 1945, Division 5 of the Commission, upon its own motion, reopened the acquisition proceedings for reconsideration to determine what, if any, conditions or restrictions should be imposed on Transportation Company's certificates with regard to the type of service which that carrier might render. A hearing was held and in *Frisco Transportation Company Extension—Joplin—Miami*, 53 M.C.C. 415 (1951), the Commission (Div. 5) rendered its decision. The principal argument made by Transportation Company against the imposition of additional conditions was the lack of power in the Commission to modify the carrier's certificates. Division 5 rejected this argument and made the following findings:

> 1. It is clear that Transportation Company's purchases of the routes in question were approved by the Commission solely to enable the carrier to perform an auxiliary and supplemental service and "the reports in each case clearly imply an intent and expectation that all motor operations not in aid of the rail service would not be undertaken." (page 423)
>
> 2. The certificates in issue may not authorize operations greater than approved in the acquisition proceedings and to the extent that they do so were inadvertently issued and may be corrected to reflect the approved operation. (page 425)

The Division directed that Transportation Company's certificates be amended to include the five conditions here in issue so as to make the carrier's operations auxiliary to or supplemental of the Railroad's train service (pages 427-435).

Transportation Company appealed this decision to the full Commission, which sustained the conclusions of Division 5. *Frisco Transportation Company—Extension—Joplin—Miami,* 62 M.C.C. 367 (1953). The Commission held that the omission of the reservation of authority from the Cooper, Hamm, Parker, and Tolson certificates did not prevent the imposition of specific conditions on the operations covered by those certificates. The agency set forth its conclusion thereon in the following language (Appendix D, 44a):

> "We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may authorize operations greater than those for the performance of which the Division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. Under these circumstances the certificates may be revoked, and certificates in accordance with such findings issued without proceeding in accordance with the provisions of Section 212(a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved."

The agency further held that *United States* v. *Rock Island Motor Transit Co.,* 340 U.S. 419 clearly author-

ized it to impose the conditions on the "Bennett" certificate since authority to do so was reserved in the certificate. (App. D, 39a).

Thereafter, Transportation Company brought its action in the District Court to enjoin, set aside, suspend, and annul the Commission's order on the principal ground that such order constituted an invalid revocation of its certificates for the route segments involved contrary to the provisions of Section 212(a) of the Interstate Commerce Act.

On August 18, 1955, the appellants filed a motion with the District Court for leave to intervene as parties defendant in this action pursuant to the provisions of Section 17(11) and 205(g) of the Interstate Commerce Act [49 U.S.C. 17(11) and 305(g)], Section 2323 of the Judicial Code [28 U.S.C. 2323], and Rule 24 of the Federal Rules of Civil Procedure, as representatives of employees of the Railroad who had a legal interest in the Commission's order which was the subject of the Complaint. This motion set forth (1) that the Railway Labor Executives' Association was an association with which there were then affiliated nineteen standard national and international railroad organizations which had agreements with the Railroad concerning rates of pay, rules, and working conditions of the Railroad's employees represented by those organizations; (2) that the Brotherhood of Railroad Trainmen and the Order of Railroad Conductors and Brakemen were standard railway labor organizations which also had agreements with the Railroad concerning the rates of pay, rules, and working conditions of railroad employees represented by those two organizations; (3) that the employees of the Railroad were protected in their job security by the Commission's order

requiring the operations of Transportation Company to be supplemental to or auxiliary of the operations of the Railroad; (4) that if Transportation Company were successful in its suit to set aside such order, its services could then be operated as a substitute for the rail services of the parent Railroad to the detriment of the employees of that Railroad represented by the organizations seeking intervention; and (5) that the interests of the employees of the Railroad represented by the organizations seeking intervention would not be represented by any other party to the proceeding.

Transportation Company opposed this intervention. The three-judge court, convened to hear the Complaint as provided in Sections 2321-1325 of the Judicial Code [28 U.S.C. 2321-2325], conducted a hearing on the motion to intervene and thereafter issued its order of March 15, 1956, granting the motion.

A hearing on the merits of the Complaint was held by such Court on June 20, 1956. On June 28, 1957, the court issued its memorandum opinion holding that the Commission's order of December 7, 1953, was invalid except as to the restrictions imposed upon the "Bennett" route and should be set aside. District Judge Moore dissented and entered a separate opinion (App. B, 5a-18a).

The majority held on the authority of *Watson Bros. Transp. Co.* v. *United States*, 132 F. Supp. 905, aff'd 350 U.S. 927, that the action of the Commission in revising the certificates of Transportation Company covering the Cooper, Hamm, Parker, and Tolson routes by imposing specific conditions in those certificates to insure that operations thereunder be auxiliary to or supplemental of the

Railroad's train service revoked or modified such certificates in violation of the provisions of Section 212(a) of the Interstate Commerce Act (App. B, 10a-12a). The majority also held that the Commission's order covering the four route segments was issued without adequate support in the evidence for the agency's finding that it had inadvertently omitted from the certificates the reservation of authority to impose future specific conditions (App. B, 13a-15a).[2]

District Judge Moore in his dissent rejected the view that *Watson Bros. Transp. Co.* v. *United States* was controlling. The dissent stated that there was nothing in that decision to indicate that this Court had changed the views expressed in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, sustaining the power of the Commission to revise certificates issued to a railroad motor subsidiary in acquisition proceedings in order to insure that operations thereunder be supplemental to or auxiliary of the parent railroad's train service. Also, Judge Moore interpreted this Court's affirmance of the majority opinion of the District Court in the *Watson* case as based upon failure of the Commission to give notice and hearing to the carrier in that case before changing its certificate rather than upon the absence of power in the Commission to make such a change even though the certificate had been inadvertently issued. The dissent further expressed the view that the omission from the certificates covering the four route segments of the reservation of authority contained in the reports in the acquisi-

[2] The court sustained the conditions placed in the certificate for the "Bennett" route on the authority of *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951).

tion proceedings was in fact a clerical error on the part of the Commission and not, as the majority found, the result of an intentional decision by the Commission to reverse the determinations made in those proceedings. (App. B, 15a-18a)

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are of substantial importance in the administration of the Interstate Commerce Act and the determination of the scope of railroad-controlled motor carrier operations under that Act.

The National Transportation Policy [49 U.S.C., preceding Section 1] declares it to be the policy of Congress to provide for regulation of all modes of transportation subject to the Interstate Commerce Act so as to recognize and preserve the inherent advantages of each, to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense.

The single most important provision of the statute for preserving the independence and inherent advantages of rail and motor transportation in their respective fields is the proviso contained in former Section 213(a)(1)—now Section 5(2)(b)—which requires that in any case where a railroad or a subsidiary of a railroad is an applicant before the Commission for approval of the purchase or acquisition of a motor carrier, the Commission may not grant such approval unless it finds that the transaction proposed will be consistent with the public interest and will enable such

carrier to use service by motor vehicle to public advantage in its operations.[3] The Commission in its application of this proviso has consistently interpreted it to mean that the proposed railroad-controlled motor service must be auxiliary to or supplemental of the rail service of the railroad involved. *Pennsylvania Truck Lines, Inc.—Control—Barker,* 5 M.C.C. 9 (1936); *Northland-Greyhound Lines, Inc.—Purchase—Liederback,* 5 M.C.C. 215, 216 (1937); *Niagara Frt. Lines—Purchase—Westlake & Albertson,* 5 M.C.C. 535, 537 (1938); *Southwestern Transportation Co.—Purchase—Hill & Howe,* 37 M.C.C. 83, 89 (1941). The Commission, from time to time, has varied the precise conditions which it believes necessary in a given case to insure that result. *United States* v. *Rock Island Motor Transit Co.,* 340 U.S. 419, 542 (1951). However, it has recognized, as it must, that the proviso of former Section 213 and the present Section 5(2)(b) lays down an absolute limitation upon the scope of railroad-controlled motor carrier service and that any railroad claim to operate a motor carrier service other than the limited service permitted by such proviso is one to be addressed to the legislature and not to the Commission. *Cincinnati, N. & C. Ry. Co.—Control—Lehigh Valley Transit,* 57 M.C.C. 4 (1950).[4]

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[3] There is a slight difference in the wording of the proviso as found in Section 213(a)(1) and Section 5(2)(b). The Commission has held that this difference is of no significance. *Scott Bros. Inc.—Control—W. G. Corp.,* 37 M.C.C. 225 (1941).

[4] The issue of the Commission's authority to grant unrestricted operating rights to a railroad-controlled motor carrier in certificate proceedings under Section 207 is now before the Court in *American Trucking Associates, Inc., et al.,* v. *United States* (Case No. 6) and *Railway Labor Executives' Association, et al.,* v. *United States* (Case No. 8), October Term, 1957.

The enforcement of this statutory requirement is important to the employees of the Frisco Railroad and to all rail employees because any deviation therefrom results in the abandonment of rail operations by railroads in favor of trucking service to the detriment of their job security.

In the present case, the majority of the District Court has invalidated Commission action to enforce this statutory limitation and has decreed that a railroad subsidiary must be permitted to operate an unrestricted motor service even though purchased subject to the limitations of Section 5. Such decision is, we believe, as set forth below, in direct conflict with the requirements of Section 213 (a)(1), now Section 5(2)(b), and the decisions of this Court delineating Commission authority thereunder and results in a destruction of the Congressional mandate with respect to the limitations on rail controlled motor services. It requires review and reversal by this Court.

1. The decision below validates an operation which the Commission did not have statutory power to authorize.

The action of the District Court permits Transportation Company to operate an unrestricted motor carrier service totally unrelated to its parent railroad's operations and without any regard at all to the limits of the statute under which the operations were acquired. There can be no serious argument that the Commission did not have statutory authority at the time it approved the purchase of the route segments involved to authorize an unrestricted service over those routes in substitution of the Railroad's train operations. The statute, in clear,

unambiguous language, required the Commission to limit those operations to services which involved coordinated rail-truck service. The Commission recognized this limitation and imposed such restriction upon its approval of the purchases. The majority of the District Court now says that the Commission is totally powerless to impose specific conditions, even after full notice and hearing, to keep the operation within the clear statutory limits, because it did not reserve such power in the certificates issued to cover the purchased routes. Such decision raises a certificate, a mere instrument to carry out statutory objectives, above the requirements of the statute itself. Appellants do not believe that this Court in the *Watson* case intended to say that a certificate which exceeded the statutory authority of the agency acquires in all circumstances an absolute immunity from any effort to amend so as to conform the operating authority it represents to statutory limitations. Yet, such is the holding of the District Court.

2. The decision below is contrary to this Court's decision in the Rock Island case.

Appellants also believe that the decision of the majority of the District Court is clearly contrary to this Court's opinion in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951). In that case this Court sustained the power of the Commission to impose the identical conditions here involved upon certificates of a wholly owned subsidiary of a railroad in situations where (a) the Commission had reserved authority to do so in the certificate itself or (b) it had reserved authority to do so in its order approving a purchase of a route and

had not yet issued the certificate. In so holding, the Court stated (pp. 445-446):

> "This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself."

This statement validates Commission action in a case like the present one where the orders approving Transportation Company's purchases pursuant to which the certificates were issued do contain a reservation of authority to later impose conditions, if necessary, to insure that the purchased operations are auxiliary to or supplemental of the parent railroad's train service.

3. A review of the decision below is required to clarify the Commission's authority with respect to railroad-affiliated motor services.

Assuming *arguendo* that the above quoted statement does not constitute an expression of this Court's approval of the Commission's action in the present case, it leaves that issue open for consideration and decision by this Court. Such fact is made clear by the Court's further statement (page 446) that if the Commission should undertake to restrict a railroad-affiliated motor carrier certificate without a reservation of authority either in the order directing issuance of the certificate or in the certificate itself, the answer to the validity of such action "should await a fully developed statement and argument by the interests affected." This appeal then at the very

least presents an important issue over which the Court should exercise jurisdiction in order to complete its determinations with respect to the scope of Commission authority over railroad-affiliated motor carrier certificates. Moreover, appellants submit that the answer to this question on the facts of the present case should result in an affirmance of the Commission's action and a reversal of the judgment below. The primary concern of the courts in this area should be to insure that the licensee is clearly on notice as to what he is getting and is not thereby misled. That objective is fully met by a reservation in an order approving a railroad subsidiary's purchase of motor carrier rights stating that the approval is subject to such future conditions as the Commission may find necessary to keep the purchased operations auxiliary to or supplemental of the railroad's train service. This is particularly so when such an order is issued pursuant to former Section 213, or present Section 5(2)(b), of the Interstate Commerce Act which prohibits a railroad or its subsidiary from acquiring and operating by purchase anything but coordinated rail-motor services.

4. The decision below deprives the Commission of power, after notice and hearing, to enforce statutory requirements by correcting inadvertent errors.

Assuming that ordinarily a reservation of authority of the type here involved should be placed in the certificate in addition to the Commission order approving the purchase, then appellants further submit that there is no rule of law which prevents the Commission from later using its reserve power where the omission from the certificate was inadvertent and full notice and opportunity to be heard is accorded

to the railroad affiliate prior to imposing additional conditions on the certificate. The Commission has consistently exercised authority to amend certificates which inadvertently did not reflect the terms of the orders directing or approving their issue. *Kenosha Auto Transport Corp.—Interpretation of Certificate,* 53 M.C.C. 85, 89 (1951); *Gray-Extension—General Commodities,* 52 M.C.C. 459, 460 (1951); *Petroleum Carrier Corp.* v. *Black,* 51 M.C.C. 717, 720 (1950); *A.C.E. Transp Co. Inc.—Interpretation of Certificate,* 47 M.C.C. 202, 203 (1947). Appellants submit that this Court has also recognized a power in the Commission to correct or revoke certificates erroneously issued. *Riss Co.* v. *United States,* 100 F. Supp. 468, 474, affirmed 342 U.S. 937; cf. *United States* v. *Seatrain Lines,* 329 U.S. 424, 428.

A similar authority has been exercised by the Civil Aeronautics Board under a statutory scheme modelled upon the Interstate Commerce Act and under which the Board exercises authority similar to that of the Commission. *Pan American Airways, Inc.—North Atlantic Route Amendments,* 7 C.A.B. 849 (1947). In the cited case, the Board, after notice and hearing, amended a certificate issued to Pan American Airways which had inadvertently, contrary to the findings in the Board's opinion granting the certificate, contained authority to serve Bermuda on a transatlantic air route.[5] Upon the basis of the reasoning of the majority of the District Court in the present case, this action of the Civil Aeronautics Board

[5] This action of the Board was approved by the President of the United States under Section 801 of the Civil Aeronautics Act [49 U.S.C. 601].

would have been declared invalid and the Federal Government would have been required under Section 406(b) of the Civil Aeronautics Act [49 U.S.C. 406(b)], to pay subsidy to Pan American for operations to Bermuda as a part of its North Atlantic operation.

5. The Court below erroneously substituted its judgment for that of the Commission on the issue of inadvertency in the omission of the reservation of authority from the certificates.

The majority of the District Court held that the finding of the Interstate Commerce Commission that the reservation of authority to impose future conditions had been inadvertently omitted from the certificates is without adequate support in the evidence. This holding is based upon misconceptions of the statute and of the proceedings before the Commission, and is clearly contrary to the established precedents with respect to the evidence necessary to support the Commission's findings.

The Court below expressed the view that the Commission was not correcting an inadvertent error, but was carrying out a new policy. (App. B, 15a). The concept that the conditions which the Commission here imposed upon the certificates of Transportation Company constituted a new Commission policy changing existing certificates was advanced to this Court in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, and specifically rejected by the Court (pp. 440 to 443).

The majority of the District Court also expressed the view that there was no inadvertent error because of the fact that the original conditional approval represented only the recommendations of a hearing ex-

aminer, not binding on the Commission, which were rejected when the certificates were issued (App. B, 13a, 14a). However, the reports of the Commission approving the purchases of the five route segments involved upon the basis of a coordinated rail-truck service and with a reservation of authority to impose future conditions were not merely the recommendations of a hearing examiner, but constituted formal actions of a Division of the Commission which were not appealed to the full Commission and which, under Commission practice, became the action of the Commission itself.

Finally, the majority below finds that the action of the Commission does not constitute correction of an inadvertent error because of a statement by the examiner in the reopened proceedings to the effect that the Commission would impose such restrictions as "are desirable" (App. B, 13a). A remark of an examiner during a hearing is obviously an inadequate basis for overriding an agency's findings.[6] The District Court simply substituted its judgment for that of the Commission with respect to the inferences to be drawn from the facts as to the Commission's prior procedures in this case, *State of Ohio v. United States*, 292 U.S. 498 (1934). The Commission is obviously the primary judge of the nature and significance of its orders, the manner in which they are issued, and the limitations upon its staff in the drafting

[6] Moreover, the examiner's statement quoted in the District Court's opinion clearly has reference to the question of what conditions should be imposed in order to carry out the statutory requirements and not to the issue of inadvertency in omitting conditions from the original certificates. This Court has already recognized in the *Rock Island* case, *supra*, p. 19, that the actual conditions imposed may vary from case to case.

of said orders, and its findings thereon are entitled to acceptance unless clearly wrong.

CONCLUSION

For the foregoing reasons, jurisdiction should be noted and the judgment of the District Court enjoining the Commission from enforcing the conditions imposed upon Transportation Company's certificates should be reversed.

Respectfully submitted,

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December 3, 1957

APPENDIX A

STATUTES INVOLVED

National Transportation Act of 1940 (49 U. S. C. 1 et seq.)

NATIONAL TRANSPORTATION POLICY (49 U. S. C., preceding sections 1, 301, 901 and 1001)

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

INTERSTATE COMMERCE ACT (49 U. S. C. 1 *et seq.*)

Section 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or

for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

Section 5 (2) (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: PROVIDED, That if a car-

rier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Sec. 212 (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license; *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary au-

thority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Section 213 (a) (1) [49 U. S. C. Section 313 (a) (1)] Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice as is required by section 205 (f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing, such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier as defined in section 1(3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5(8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest, enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, a corporation, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*.

Memorandum Opinion

Before VAN OOSTERHOUT, Circuit Judge, MOORE and HARPER, District Judges.

Appearances:

John E. McCullough, Ernest D. Grinnell, Jr., A. J. Baumann, St. Louis, Missouri, appeared on behalf of the plaintiff, Frisco Transportation Company, a corporation.

Wayne H. Bigler, Asst. U. S. Attorney, St. Louis, Missouri, and Maurice A. Fitzgerald, Attorney, Department of Justice, Washington, D. C., appeared on behalf of the United States of America, defendant.

C. H. Johns, Asst. General Counsel, Interstate Commerce Commission, Washington, D. C., and Wayne H. Bigler, Asst. U. S. Attorney, St. Louis, Missouri, appeared on behalf of the Interstate Commerce Commission, defendant.

B. W. LaTourette, St. Louis, Missouri, appeared on behalf of Viking Freight Company, Be-Mac Transportation Company, C. E. S. Truck Lines and L. A. Tucker Truck Lines, intervenors.

Peter T. Beardsley, Washington, D. C., appeared on behalf of American Trucking Association, Inc., and its Regular Common Carrier Conference, intervenors.

Carroll J. Donohue, St. Louis, Missouri, and James L. Highsaw, Washington, D. C., appeared on behalf of Railway Labor Executives Association, intervenors.

Wentworth E. Griffin, Kansas City, Missouri, appeared on behalf of Campbell "66" Express, intervenor.

HARPER, Judge.

This is an action by the Frisco Transportation Company, a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission entered on December 7, 1953, which order purports to cancel certain certificates, and at the same time new or amended certificates would be issued.

This court has jurisdiction of the subject matter of this action, 28 USCA, Sec. 1326, and the case was heard by a court composed of three judges pursuant to Sections 2321-2325, 28 USCA.

At issue in this proceeding is the propriety of the cancellation and re-issue in restricted form of five operating certificates authorizing motor carrier operation by plaintiff in areas adjacent to those served by the Frisco Railroad. The Commission contends that four of these certificates issued in the year 1942 were incomplete in form in that they failed to include, due to a clearical error, a reservation of the power to restrict the operations of plaintiff by imposing limitations designed to insure that plaintiff's motor carrier service would be auxiliary and supplemental to the parent company's rail service, the necessity and propriety of such reservations of power having been determined in the finance hearings conducted when plaintiff sought to purchase truck routes from those then operating them. Plaintiff denies that such certificates were in fact issued with an inadvertent omission of the reservation of power previously determined necessary,

and asserts further that, even should this be the case, the Commission is without power to correct them at this time, its power in this respect being limited by Sec. 212(a) of the Interstate Commerce Act, 49 USCA, Sec. 312(a).

With respect to the fifth certificate (Bennett), the plaintiff asserts that the Commission is without power to restrict its operation.

Under consideration in the original hearings of 1938 and 1939 and in the re-opened Commission proceedings beginning in 1945, which resulted in this action being brought, were six truck routes identified before us by the name of the vendor from whom purchase was authorized. These are the "Cooper" route from Joplin, Missouri, to Carthage, Missouri; the "Hamm" route from Joplin, Missouri, to Miami, Oklahoma; the "Tolson" route from Walnut Ridge, Arkansas, to Memphis, Tennessee; the "Parker" route from Blytheville, Arkansas, to Memphis, Tennessee; the "Rose" route from Hugo, Oklahoma, to Paris, Texas; and the "Bennett' route from Blytheville, Arkansas, to Lake City, Arkansas. In its reconsideration of the "Rose" certificate the Commission ordered no change. The operating certificate for the "Bennett" route was issued in 1940 with the recital of a reservation of power to impose additional restrictions on the scope of activities permitted under the certificate, and hence, under the rule of *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, rehearing denied 341 U.S. 906, there can be little question of the power of the Commission to impose the restrictions which it has incorporated in the amended Bennett certificate. These restrictions are as follows:

> "1. The service to be performed by the Frisco Transportation Company, hereinafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, hereinafter called the Railway, except that this condition shall not apply with respect to Dyess, Ark.

"2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

"3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Memphis, Tenn., and Amery-Tupelo (considered as one), Miss.

"4. All contractual arrangements between the Transportation Company and the Railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

"5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the railway."

Determination of the propriety of the change made in the four remaining certificates requires a somewhat more detailed examination of the administrative history of the certificates which plaintiff seeks to retain unaltered. In 1938 and 1939, finance hearings were held by an examiner for the Commission with regard to the acquisition of truck routes by plaintiff, organized in 1937, to provide co-ordinated rail-motor carrier service. After the finance hearings on these four acquisitions the examiner made his report approving acquisition by plaintiff of the routes, but in each case concluded his report with the following language:

"* * * Provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereinafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said Railway Company and shall not unduly restrain competition.

Following the finance hearings, Division 5 of the Interstate Commerce Commission approved and adopted the report of the Hearing Examiner, with one commissioner dissenting. Following the action by Division 5 of the Commission, the plaintiff completed the purchase, and operations were commenced by the plaintiff in early 1939, and have continued without change as to the nature of or without interruption to the present time.

Thereafter, in June and July of 1939, compliance orders were issued by Division 5 of the Commission with respect to the four routes in question. The compliance orders do not contain the limitations contained in the findings in each of the finance proceedings. In 1942, certificates were issued by the Commission to the plaintiff with respect to each of the four routes, which certificates do not contain the limitations contained in the findings in each of the finance proceedings.

In July, 1941, before the issuance of the certificates under consideration, competing motor carriers filed complaints with the Commission alleging that plaintiff was operating a motor carrier service independent of parent Railway's rail service and in contravention of the condition imposed by the Commission in the finance hearings. Proceedings were had by the Commission to inquire into these complaints, and the Commission in 1946 concluded that plaintiff was not operating in violation of the terms of its certificates. The Commission indicated, however, that the ruling should not be taken as sanctioning such operation, since the proceedings pursuant to which the certificates in question were issued to the plaintiff had in fact already been re-opened for further hearing. The Commission had started these hearings in 1945, in Division 5, and Division 5 held that the operating certificates had been issued with an inadvertent omission of the proviso set out in the report of the finance hearings, and directed the cancellation and re-issue of the certificates.

Upon a petition for reconsideration presented to the full Commission, the matter was reheard by it in November, 1952. A report of the Commission issued in December, 1953, upheld the action of Division 5 in incorporating the restrictions in the operating certificates, in a divided opinion, four commissioners dissenting and one not participating. A petition for reconsideration was denied by the Commission in April, 1955, and this action was commenced a month later.

A three-judge court, in *Watson Bros. Transportation Co.* v. *U. S.*, 132 F. Supp. 905 (Affirmed 350 U.S. 927), said, l.c. 909:

> "Counsel for the Commission argues that the order of August 25, 1953, merely corrects a clerical error in the certificate of July 19, 1949. Even if the court were to assume that the Commission has authority to correct clerical errors without notice and hearing, the result in this case would not be different, because it is the holding of the court that the order of August 25, 1953, is more than the mere correction of a clerical error; and is an attempt made contrary to Section 212 to revoke and change a certificate duly issued.

The court in the above language clearly indicates that certificates duly issued cannot be modified in the manner sought to be modified in the case before us, even though some prior report of the Commission indicates to the contrary. This is clearly borne out by the dissenting opinion of Judge Johnsen in that case, wherein he said, l.c. 909-10:

> "The effect of the majority opinion is to hold that, where the Commission has defined the scope of public convenience and necessity existing in a particular situation, by a finding such as the statute requires, but it has in some manner issued a certificate in excess of or contrary to the limits of the public convenience and necessity so found, it can not call in the certificate or engage in any correction or reissuance thereof, in order to make the certificate conform to its finding, unless it grants the holder a hearing."

The case before us with respect to the four certificates in question is a much stronger case on the part of the plaintiff insofar as the facts are concerned than the *Watson Bros.* case. Here intervening between the issuance of the finance report and the certificates in question, was issuance by the Commission of compliance orders, which did not contain the limitation contained in the findings in the finance proceedings. The action of the Commission in adopting the finance hearing report was not unanimous. Between the time that the compliance orders were issued and the four certificates were issued, a certificate was granted with respect to the Bennett route, in which the limitations were imposed. Thereafter, and before the certificates were issued by the Commission, proceedings were instituted by competing motor carriers, complaining that the restrictions set up in the finance hearing report were applicable and that the plaintiff was operating in contravention of those conditions.

After all of these things had occurred the four certificates in question were issued. We must bear in mind that insofar as the Commission is concerned, that the words "auxiliary to" or "supplemental of" are not taken from the Act as set forth in the *Rock Island* case, supra. At pages 433-34, the court said:

> "But power in the Commission, before issuance of a certificate or approval of acquisition, to limit railroad motor operations so as to make them auxiliary and supplemental to rail service does not necessarily imply power to change the conditions designed to bring about the desired coordination, after issuance of the certificate. The parent railroad may have acquired or developed its motor affiliate in reliance on the conditions stated in the certificate."

The Commission in *Smith Bros. Revocation of Certificate,* 33 M.C.C. 465, l.c. 472, said:

> "We may issue decision upon decision and order upon order, on an application for a certificate so long

as sufficient reason therefore appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or degree marks the end of a court proceeding.

As was said by the Supreme Court in the *Rock Island* case, supra, l.c. 448:

> "What slight bearing *Seatrain* has weighs on the side of the interlocutory character of the approval order. The sentence referred to reads:
>
> "'But, as the Commission has said as to motor carrier certificates, while the procedural "orders" antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding.'"

Under the *Watson Bros,* decision, the action of the Commission is an attempt made contrary to Section 212 to revoke and change a certificate duly issued, and is more than the mere correction of a clerical error.

While the above disposes of the case, we are futher persuaded that no clerical error exists. The functions of the reviewing court are exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Rochester Telephone Co.* v. *U. S.*, 307 U.S. 125; *Mississippi Valley Barge Line* v. *U. S.*, 292 U.S. 282.

In the *Mississippi Valley Barge Line* case, supra, l.c. 286-87, the Supreme Court said:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

The courts, however, have held in reviewing administrative orders that the orders must be supported by evidence. In *Lang Transportation Corporation* v. *U. S.*, 75 F. Supp. 915, l.c. 924, the court said:

> "Orders of the Interstate Commerce Commission which are contrary to and without adequate support in the evidence are void and have been consistently set aside by the courts." Citing *Eastern Central Motor Carriers Association* v. *U. S.*, 321 U.S. 194; *Florida* v. *U. S.*, 282 U.S. 194; *Baltimore & Ohio Railroad Company* v. *U. S.*, 264 U.S. 258, and a number of district court cases.

In the instant case the four orders last referred to are without adequate support in the evidence. The history of the case we have set forth above clearly demonstrates that what was sought to be accomplished here, at this late date, was to restrict the operations of the plaintiff, not because a clerical error had occurred, but based upon the question of whether or not such was desired. A statement by Examiner Croft, at page 59 of the transcript of the hearing, bespeaks as much when he said during the hearing, before testimony was introduced:

> "Well, it is my assumption that if the Commission finds that restrictions are desirable, and if it concludes that it has authority to impose them at this time, they will put in restrictions similar to the so-called Kansas City Southern restrictions, including the condition 3, naming either key points or requiring an immediately prior or immediately subsequent rail haul. * * * In other words, I want information on which we can impose a workable restriction."

Where does this indicate that the restrictions will be the result of correcting a clerical error or that the hearing is about a clerical error? The report of the finance hearing examiner as to the four routes was adopted by a divided division of the Commission, with one dissent. Who would say that the Commission is bound by the recommendations

of the hearing examiner? The books are full of cases where the recommendations of the hearing examiners have not been followed, and yet the certificates are not the result of clerical errors. The Commission is not a rubber stamp for the conclusions of hearing examiners.

Months after the approval of the finance report by a divided division, compliance orders were issued for the four routes. Thereafter, a certifiate was issued for the Bennett route containing restrictions. A complaint was filed by competing carriers, complaining that the plaintiff was ignoring the restrictions of the finance hearing report, but thereafter the four certificates were issued. In the face of all of this, the Commission would have us believe that the purported changes are made as the result of clerical error.

While, as set out above, under the *Watson Bros.* case we are of the opinion that the four certificates cannot be canceled as a result of the hearing conducted by the Commission since it was not conducted under Sec. 212 of the Act, yet, if we agreed with the dissenting opinion in the *Watson Bros.* case, we would still be of the opinion in this case that the four certificates in question could not be canceled anr reissued because no clerical error in fact existed. We would not overrule the actions of the Commission taken at the time that the compliance orders were issued, and the certificates were issued merely because the hearing examiner at the finance hearings would have put limitations on the certificates. For us to hold that the members of the Interstate Commerce Commission are bound by the recommendation of a hearing examiner in his report, a report that was adopted by a divided division, would be to hold that the members of the Commission could not have minds of their own.

Clerical errors should be readily apparent. Such is not the case here. Four of the members of the Commission dissented and one took no part. Two of the commissioners

wrote dissents setting out that in their opinion the record does not justify the finding of the majority of the Commission.

The arguments advanced here for the defense are the arguments of the minority opinion in the *Watson Bros.* case, supra. What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such.

Judgment will accordingly be for the plaintiff with respect to the "Cooper", "Hamm", "Tolson" and "Parker" routes, and the action of the Commission confirmed with respect to the "Bennett" route. Attorneys for the plaintiff will prepare the appropriate Findings of Fact, Conclusions of Law and Judgment, and present same to the court for entry.

M. D. VAN OOSTERHOUT
U. S. Circuit Judge

.....
U. S. District Judge

ROY W. HARPER
U. S. District Judge

MOORE, Judge

Reluctantly, I must dissent from the opinion of the majority, believing as I do that the Interstate Commerce Commission acted correctly. After examining the record, I am persuaded that the omission of the proviso from the operating certificates (other than the "Bennett" certificate) was, in fact, a clerical error on the part of the Commission and not, as plaintiff alleges, the result of an intentional decision to reverse the determination made at the

finance hearings at which both plaintiff and competing carriers participated and offered evidence. The unrestricted compliance orders which are at variance with the finance hearings determinations were made without any hearing at which intervenor motor carriers might have been heard. The intervening motor carriers and the defendant Commission did not sleep on their rights in this matter. Protests were filed with the Commission even before the operating certificates were issued. I think it is significant that rail-affiliated motor carrier applications for authority to offer motor-carrier services to the public were a distinct minority of the total number of motor carrier service authorizations sought in the 'thirties and the 'forties; no doubt those charged with the responsibility of issuing compliance orders and operating certificates found it easy to omit the proviso which was required on only a few of the motor carrier certificates with which the Section of Certificates dealt. I think it is also noteworthy that plaintiff did not file a petition for reconsideration after the conclusion of the finance hearings, as was its right under the procedural rules of the Commission. *I.C.C. General Rules of Practice, 101 (a).*

I cannot see that Transportation Company's case would be any stronger if I were in fact persuaded that the omissions from the finance orders and certificates were intentional. I do not see how plaintiff could justify changes in the Commission's findings made without giving notice, or an opportunity to be heard to those appearing at the acquisition proceedings. *49 U.S.C.A. Sec. 305(a).*

I cannot accept the view of the majority that the Watson Bros. Transportation Co. case is controlling. The basis for my view is that the "power to modify" issue which the Watson case is supposed to have settled was expressly reserved by the Supreme Court in the Rock Island case *supra.*

> "This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor

carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such procedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected." 340 U.S. 419, 445.

The decision of the three-judge court in that case was affirmed in the Supreme Court on motion. Rule 16-1(c) of the Revised Rules of the Supreme Court provides:

"The Court will receive a motion to affirm a judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." 1954, 346 U.S. 951, 964.

The language of this rule persuades me that the Supreme Court did not affirm the decision below on this inadvertence issue, but rather on the lack of hearing and notice. I believe the section of the Interstate Commerce Commission Act, Sec. 212(a), which plaintiff offers in support of its position, is intended to prevent the Commission from making changes in certificates when such certificates have been lawfully issued in accordance with previous findings of the Commission made after due notice and hearing. I do not think that, for example, if in these administrative proceedings the Section of Certificates had erroneously issued a certifiate of authority to an intervenor motor carrier instead of to Frisco Transportation Company that such a mistake would permanently tie the hands of the Commission and thus nullify the previous findings made in the prior administrative hearings. On the issue of due process raised by the plaintiff I shall say only that I do not believe anyone can acquire an indefeasible interest in a mistake. I see no good reason in the absence of any clear legislative mandate to hold that so powerful an ad-

ministrative agency as the Interstate Commerce Commission is unable to correct the clerical errors made by a subordinate entity not empowered to vary the findings and decisions of its creators.

DATED this 28th day of June, 1957.

(Signed) GEO. H. MOORE
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN JUDICIAL DISTRICT OF MISSOURI—EASTERN DIVISION

CIVIL ACTION No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *et al*, *Defendants*.

Judgment

This cause came on for final hearing on the complaint herein, praying for a decree enjoining and restraining the United States and its agency, the Interstate Commerce Commission, from enforcing the order of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding bearing the principal caption of MC 89913 Sub. No. 1, Frisco Transportation Company Extension—Joplin-Miami, and the chief judge of the United States Court of Appeals for the Eight Circuit having called to the assistance of the Honorable George H. Moore, to hear and determine this cause, the Honorable Martin D. Van Oosterhout, Judge of the Court of Appeals for this Circuit, and the Honorable Roy W. Harper, Judge of the United States District Court for the Eastern District of Missouri, Eastern Division, pursuant to Section 2281 of Title 28 of the United States Code, and said cause and the evidence therein having been heard before said three judges, it is

Ordered, adjudged and decreed that the United States of America and its agency, the Interstate Commerce Commission, be and they are hereby enjoined from enforcing the second ordering paragraph of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding bearing the principal caption MC 89913 Sub. No. 1, Frisco Transportation Company Extension—Joplin-Miami, and said second ordering paragraph is hereby forever set aside, suspended and annulled. The relief sought by plain-

tiff in connection with its certificate bearing No. MC-89913 (Sub No. 10) is denied, and the Interstate Commerce Commission's Order with respect thereto is affirmed.

Dated Aug. 9th, 1957.

/s/ MARTIN D. VAN OOSTERHAUT
United States Circuit Judge

/s/ ROY W. HARPER
United States District Judge

GEORGE H. MOORE,
United States District Judge, dissenting.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN JUDICIAL DISTRICT OF MISSOURI—EASTERN DIVISION

CIVIL ACTION No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *et al*, *Defendants*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. (a). Plaintiff, Frisco Transportation Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business in the City of St. Louis, Missouri.

(b) United States of America is named a defendant pursuant to Section 2322 of the Judicial Code, 28 USCA Section 2322.

(c). The Interstate Commerce Commission intervened as a defendant in accordance with the provisions of Section 2323 of the Judicial Code, 28 USCA Section 2323.

(d). Be-Mac Transport Company, Inc.; Viking Freight Company, C.E.S. Truck Lines, Inc.; L. A. Tucker Truck Lines, Inc.; Consolidated Forwarding Company, Inc.; American Trucking Associations, Inc. and its Regular Common Carrier Conference; Railway Labor Executives Association; Brotherhood of Railroad Trainmen; Order of Railway Conductors and Brakemen of America; and Campbell "Sixty-Six" Express, Inc. were allowed to intervene as parties defendant after the filing of appropriate petitions for leave to intervene.

2. Plaintiff is a common carrier by motor vehicle engaged in the transportation of persons and property in interstate and intrastate commerce, and is a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, a common carried by rail subject to the Interstate Commerce Act.

3. In this suit we are asked to review an order of the Interstate Commerce Commission cancelling certain operating certificates of plaintiff bearing the numbers MC 89913 Sub. No. 1 (Hamm), MC 89913 Sub. No. 3 (Cooper), MC 89913 Sub. No. 5 (Parker), MC 89913 Sub. No. 6 (Tolson), and requiring the issuance of new or amended certificates in lieu thereof. We are also asker to review the same order insofar as it modifies a certificate of plaintiff bearing number MC 89913 Sub. No. 10 (Bennett). The names in parentheses are the parties from who plaintiff purchased the operating rights represented by these certificates. These names will some times be used in referring to the certificates in these findings and conclusions.

4. The proceedings before the Commission also involved plaintiff's certificate bearing number MC 89913 sub. No. 2 (Rose), but since the Commission did not order any modification of that certificate, no action by this Court is necessary on the portion of the order dealing therewith. Therefore, the remaining findings of fact do not apply to that certificate.

5. On October 17, 1939, plaintiff filed an application to purchase a portion of the motor carrier operating rights and property of Bennett. After hearings were held, the Commission approved said purchase on March 15, 1940. A memorandum decision reporting this approval appears in 35 MCC 802. On June 13, 1940, the Commission granted plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 10, authorizing plaintiff to engage in interstate or foreign commerce as a common carrier by motor vehicle over the operating rights purchased from said Bennett, which said certificate contained the following:

> "The operations herein authorized are subject to such further limitations, restrictions, or modifications as the Commission may hereafter find it necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the St. Louis-San Francisco Railway Company, and shall not unduly restrain competition."

6. During the years 1938 and 1939, plaintiff filed applications to purchase the motor carrier operating rights and properties of Hamm, Cooper, Parker and Tolson. After finance hearings were held, Examiner's Proposed Reports were issued in connection with each of these applications, which Reports approved the purchase by plaintiff of the operating rights and properties of these motor carriers and concluded with the following language:

> "• • • Provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereinafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said Railway Company and shall not unduly restrain competition."

7. Division 5 of the Interstate Commerce Commission approved and adopted the Reports of the hearing Examiners, with one Commissioner dissenting in each case. These

Reports appear as follows: Hamm-15 MCC 320; Cooper-15 MCC 317; Parker-25 MCC 96; Tolson-25 MCC 96.

8. Following the action by Division 5 of the Commission, plaintiff completed the purchases, and operations were commenced by the plaintiff in early 1939, and have continued without change as to the nature of or without interruption to the present time.

9. On March 11, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Cooper, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued its order (commonly refered to as a "compliance order") in Docket MC 89913 Sub. No. 3, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Joseph D. Cooper, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On March 31, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 3, including inter alia the operating rights purchased from Cooper, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

10. On March 14, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Hamm, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 1, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by John

Hamm, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On March 31, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 1, including inter alia the operting rights purchased from Hamm, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

11. On June 16, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Parker, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 5, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Joseph W. Parker, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On April 18, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 5, including inter alia the operating rights purchased from Parker, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

12. On July 10, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Tolson, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 6, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering op-

erating authority previously applied for by Louis Tolson, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On April 18, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 6, including inter alia the operating rights purchased from Tolson, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

13. In July 1941, prior to the issuance of the certificates of public convenience and necessity in Cooper, Parker, Hamm and Tolson, competing motor carriers filed complaints with the Commission, alleging that plaintiff was operating a motor carrier service independent of its parent railroad's rail service and in contravention of the condition imposed by the Commission in the finance hearings. After appropriate proceedings, the Commission concluded in 1946 that plaintiff was not operating in violation of the terms of its certificates (46 MCC 22). The Commission's opinion indicated that the ruling should not be taken as sanctioning such operation since the proceedings pursuant to which the Hamm, Cooper, Parker and Tolson certificates were issued to plaintiff had been reopened for further hearing.

14. The proceedings which resulted in the Commission's order of December 7, 1953, had their beginning on January 4, 1945, when the Commission entered an order reopening for reconsideration the proceedings by which plaintiff acquired the Hamm, Cooper, Parker and Tolson certificates.

15. On April 8, 1946, such reopened proceedings were heard by a hearing Examiner. During that hearing, the hearing Examiner made the following statement:

> "Well, it is my assumption that if the Commission finds that restrictions are desirable, and if it concludes that it has authority to impose them at this time, they will put in restrictions similar to the so-

called Kansas City Southern restrictions, including the condition 3, naming either key points or requiring an immediately prior or immediately subsequent rail haul. * * * In other words, I want information on which we can impose a workable restriction." (59 of Transcript).

16. On May 17, 1948, a recommended report and order on further hearing was filed by Examiners William T. Croft and Beverly S. Simms.

17. After exceptions were filed, Division 5 of the Commission issued its report on further hearing on October 22, 1951. This report appears in 53 MCC 415.

18. After plaintiff filed a petition for reconsideration of the report of Division 5, the Commission reopened the proceedings for oral argument, and after such argument, the Commission modified the report of Division 5 by its report of December 7, 1953, which appears in 62 MCC 367. The order under attack was entered pursuant to this report.

19. Plaintiff's petition for reconsideration of this report and order was filed on February 2, 1954, and was denied by the Commission on April 4, 1955.

20. Plaintiff filed this suit on May 20, 1955, and on the same date a temporary restraining order was entered which enjoined the enforcement of the order of December 7, 1953, and the order of April 4, 1955.

21. The facts as to the various steps in the handling of this case beginning in 1938 and extending through the issuance of the certificates in 1942, as stated in findings of fact 6-13 inclusive herein, do not support the Commission's finding that such certificates were issued in their unrestricted form as a result of a clerical error or errors. Rather, a complete examination of the record fails to disclose any evidence that a clerical error in fact existed in the issuance of the certificates in question.

22. There was no evidence of record before the Commission which could be used as a basis for finding that a clerical error existed in the issuance of plaintiff's certificates bearing numbers MC 89913 Sub. No. 1, MC 89913 Sub. No. 3, MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6.

Conclusions of Law

1. This is an action to enjoin, set aside, suspend and annual an order of the Interstate Commerce Commission entered on December 7, 1953 (62 MCC 367), which order purports to cancel certain operating certificates of plaintiff and at the same time issue new or amended certificates.

2. This Court has jurisdiction of the subject matter of this action, 28 USCA Sec. 1326, and the case was heard by a Court composed of three judges pursuant to 28 USCA Sec. 2321-2325.

3. Since the Commission did not order the cancellation or modification of the certificate bearing number MC 89913 Sub. No. 2 (Rose), no action by this Court is necessary in connection with the certificate bearing that number.

4. The Commission's action with respect to the certificate bearing number MC 89913 Sub. No. 10 (Bennett) was within its powers in view of the reservation of the power to impose additional restrictions on the scope of activities permitted under the certificate, and hence, under the rule of *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, rehearing denied 341 U.S. 906, the Commission's action with regard to that certificate is affirmed and no injunction should issue as to that part of the order.

5. Plaintiff's certificates bearing the numbers MC 89913 Sub. No. 1 (Hamm); MC 89913 Sub. No. 3 (Cooper); MC 89913 Sub. No. 5 (Parker); MC 89913 Sub. No. 6 (Tolson) were duly issued.

6. The granting of a motor carrier certificate by the Commission marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. *Smith Bros. Revocation of Certificate*, 33 MCC 465, 472.

7. Motor carrier certificates duly issued cannot be modified in the manner in which plaintiff's certificates in this case were sought to be modified by the Commission, even though some prior report indicates the contrary. *Watson Brothers Transportation Company* v. *U. S.*, 135 F.S. 905 (affirmed 350 U.S. 927).

8. Section 212-(a) of the Interstate Commerce Act, 49 USCA Section 312-(a), sets forth the only basis for revocation of a motor carrier certificate as follows:

> "Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however*, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder * * *."

9. The action taken by the Commission in cancelling the Hamm, Cooper, Parker and Tolson certificates on the ground that said certificates were "inadvertently issued", is an attempt made contrary to Section 212 of the Interstate Commerce Act to revoke or change a certificate duly issued, and is more than the mere correction of a clerical error.

10. Orders of the Interstate Commerce Commission must be supported by adequate evidence. *Lang Transportation Corp* v. *U. S.*, 75 F.S. 915, 924; *Eastern Central Motor Carriers Assn.* v. *U. S.*, 321 U.S. 194; *Baltimore & Ohio Railroad Company* v. *U. S.*, 264 U.S. 258; *Florida* v. *U. S.*, 282 U.S. 194

11. The finding in the order of December 7, 1953, that the Hamm, Cooper, Parker and Tolson certificates were "inadvertently issued" is without adequate support in the evidence.

12. Clerical errors must be readily apparent, and the alleged clerical errors in this case are not apparent.

13. Failure by the Commission to follow Examiner's proposed report is not a sufficient showing to prove that a clerical error existed.

14. The issuance of compliance orders as found in findings of fact 9, 10, 11 and 12, and the existence of a pending complaint challenging plaintiff's right to operate over these certificates as found in finding of fact 13, together with the statement by the hearing Examiner as found in finding of fact 21, and the issuance in 1940 of a restricted certificate in connection with plaintiff's Bennett purchase, negate the existence of clerical error in the issuance of the Hamm, Cooper, Parker and Tolson certificates, and compel the conclusion that no clerical error existed in the issuance of those certificates.

15. The Commission's order of December 7, 1953, as it applies to plaintiff's certificates bearing numbers MC

89913 Sub. No. 1, MC 89913 Sub No. 3, MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6, should be enjoined, set aside, suspended and annulled because said order is contrary to the provisions of Section 212 (a) of the Interstate Commerce Act, 49 USCA Section 312 (a).

16. In addition, because the Commission's finding that said certificates were issued as a result of clerical error is without the support of adequate evidence, the order of December 7, 1953, as it applies to the certificates described in conclusion of law 15, should be enjoined, set aside, suspended and annulled.

17. Either of the reasons stated in conclusions of law 15 or 16 would be sufficient in and of itself to require that the order be enjoined, set aside, suspended and annulled.

18. Because of our conclusion as stated in conclusion of law 15, it has not been necessary for us to consider the additional evidence offered by plaintiff at the hearing before this Court. Our consideration has been limited to the record made before the Commission beginning with the January 4, 1945 order reopening for reconsideration the proceedings by which plaintiff acquired the Hamm, Cooper, Parker, Tolson, Rose and Bennett certificates, in accordance with the well-established principle that "* * * the validity of the order [of the Interstate Commerce Commission] must be determined upon evidence introduced before the Commission." *Lousiville & Nashville Railroad Company* v. *United States,* 245 U.S. 463, 466. This principle requires that we give no consideration to matters not in the record before the Commission, but even were it proper for us to take into consideration matters such as those tendered by the Interstate Commerce Commission at the hearing before this Court, our conclusions as stated in conclusions of law 15 and 16 would not be different.

19. A permanent injunction should issue enjoining the enforcement of the provisions of the December 7, 1953,

order as it applies to plaintiff's certificates bearing the numbers MC 89913 Sub. No. 1; MC 89913 Sub. No. 3; MC 89913 Sub. No. 5 and MC 89913 Sub No. 6.

20. No injunction should issue in connection with said order as it applies to plaintiff's certificate bearing the number MC 89913 Sub. No. 10.

(s) MARTIN D. VAN OOSTERHANT
United States Circuit Judge

(s) ROY W. HARPER
United States District Judge

George H. Moore, United States
District Judge, dissenting.

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. MC-89913 (Sub-No. 1).[1]

FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-MIAMI.

Decided December 7, 1953.

Upon oral argument, findings in prior report, 53 M. C. C. 415, modified. Certain certificates heretofore issued to Frisco Transportation Company canceled on finding that they were inadvertently issued. Conditions imposed in certificates authorized to be issued in lieu of those canceled and in certificate No. MC-89913 (Sub-No. 10) in order to insure that the service rendered thereunder shall in the future be limited to that which is auxiliary to, or supplemental of, rail service. Other prior reports: 15 M. C. C. 317, 15 M. C. C. 320, 15 M. C. C. 323, 25 M. C. C. 96, 35 M. C. C. 132, and 35 M. C. C. 802.

Appearances as shown in prior reports and, in addition, *J. E. McCullough* for a transportation company; and *James F. Pinkney* for an intervener in opposition.

Report of the Commission on Oral Argument.

By the Commission:

These proceedings involve principally the issue of whether certain certificates heretofore issued the Frisco Transportation Company, a wholly owned subsidiary of

[1] This report embraces the proceedings listed in appendix A hereto.

the St. Louis-San Fransciso Railway Company, hereafter called the Transportation Company and the railroad, respectively, were inadvertently issued.

In its report on further hearing, 53 M. C. C. 415, division 5 found that the certificates issued to the Transportation Company in the proceedings listed in part I of appendix A hereto, except No. MC-89913 (Sub-No. 10), were inadvertently issued; that such certificates should be revoked and at the same time new or amended certificates in conformity with the findings in the proceedings listed in part II of appendix A hereto and which require that all future operations conducted thereunder shall be subject to the limitations or restrictions set forth in appendix B hereto, should be issued in lieu thereof; and that the certificate issued in No. MC-89913 (Sub-No. 10), should be modified so as to require that all future operations conducted thereunder shall be subject to the limitations or restrictions as described in appendix B.

Upon petition of the Transportation Company, to which Campbell Sixty-Six Express, Inc., an intervener in opposition, and the American Trucking Associations, Inc., and Regular Common Carrier Conference of the American Trucking Associations, Inc., interveners, replied, for good cause shown, by order entered July 7, 1952, we reopened the proceedings and the parties have been heard in oral argument. The facts are set forth in the prior report on further hearing, 53 M. C. C. 415, in considerable detail and need be restated herein only to the extent necessary for clarity of discussion and a determination of the issues presented by the petitions and at the oral argument.

The Transportation Company holds certificates authorizing motor common carrier operations over an extensive system of regular routes in Missouri, Arkansas, Tennessee, Mississippi, Kansas, Oklahoma, and Texas. More specifically, its routes extend from St. Louis, Mo., on the northeast, Memphis, Tenn., and Columbus, Miss., on the south-

east, and Kansas City, Mo., on the north, to Oklahoma City, Okla., and Dallas, Tex., on the southwest. They aggregate several thousand miles, of which about 284 miles are involved in the subject proceedings. Although these authorized routes parallel generally the lines of the railroad, there are substantial segments which reach or traverse a considerable area not served by the railroad, and in a number of instances connect divergent rail lines. All of the routes, except about three, were acquired through the purchase of the operating rights of various independent motor carriers. The character of the operations authorized over the system in general will be described briefly in order that the matters here in issue may be more fully understood. No restrictions limiting the operations to a rail auxiliary or supplementary service[2] are imposed on the routes (1) between St. Louis and Carthage, Mo., via Springfield, (2) between Kansas City and Springfield, (3) between Lebanon and Collins, Mo., which connects the two preceding routes north of Springfield, (4) between Alma, Ark., and Springfield, (5) between Dallas, Oklahoma City, and Miami, Okla., (6) between Memphis and Columbus, and (7) between Jonesboro, Ark., and Memphis. Operations over these routes are, however, in certain instances limited to service at rail stations or at points not more distant than 10 miles from rail stations of the railroad. The routes between St. Louis and Hoxie, Ark., via Cabool, Mo., partly over the route described in (1) above, and between Springfield and Cabool are subject to two restrictions. One limits the service to points within 10 miles of rail stations, and the other designates St. Louis and Memphis as key points.[3] Extend-

[2] Such a restriction permits only all-motor movements in the handling of rail traffic at railroad rates and on railroad bills of lading. See *Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M. C. C. 721, 726.

[3] The key-point restriction precludes the transportation of shipments between the points designated as key points, or through, or to, or from, more than one such point.

ing from the last-named routes are routes into Van Buren and Mountain View, Mo., operation over which is also subject to key-point restrictions at St. Louis and Memphis. The routes between St. Louis and Blytheville and certain other points in Arkansas and Missouri are subject to all of the conditions usually imposed in operations of this character, including the designation of St. Louis, Chaffee and Hayti, Mo., and Blytheville as key points and a restriction against transporting shipments by truck between St. Louis and points south or west of Chaffee. The usual conditions, including a rail-haul condition,[4] are also applicable on the routes between Datto and Walnut Ridge, Ark., between Lake City and Nettleton, Ark., and between Marked Tree and West Ridge, Ark.

The six certificates involved in the instant proceedings are listed in part I of appendix A. These certificates, except No. MC-89913 (Sub-No. 10), were issued pursuant to approved purchases of the operating rights of several independent motor carriers as shown in part II of appendix A. The certificate in No. MC-89913 (Sub-No. 10) was issued pursuant to the purchase approved in No. MC-F-1037 and it alone contains a specific condition subjecting the operations to such future limitations as we may find necessary to impose in order to insure that the service performed shall be auxiliary to, or supplemental of, rail service. The circumstances leading to the issuance of each of these six certificates are discussed in considerable detail in the prior report beginning at page 418 and we see no need to repeat them here. Briefly, division 5 approved the purchases by the Transportation Company of the operating rights (1) of John Hamm between Miami and Joplin, Mo.,

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[4] The rail-haul condition requires that the shipments transported by truck receive an immediately prior or immediately subsequent movement by rail.

(2) of J. A. Rose from[5] Hugo, Okla., to Paris, Tex., (3) of Joseph D. Cooper between Joplin and Carthage, Mo., (4) of Joseph W. Parker between Blytheville and Memphis, (5) of Louis Tolson between Walnut Ridge and Memphis, and (6) of T. N. Bennett between Lake City and Blytheville. The operating rights so purchased were later assigned Nos. MC-89913 (Sub-No. 1), MC-89913 (Sub-No. 2), MC-89913 (Sub-No. 3), MC-89913 (Sub-No. 5), MC-89913 (Sub-No. 6), and MC-89913 (Sub-No. 10), respectively.

In each of the proceedings approving the above-described purchases (see part II of appendix A), a finding was made that the purchase would be consistent with the public interest, that it would promote the public interest by enabling the railroad to use service by motor vehicle to public advantage in its operations, and that it would not unduly restrain competition. In each instance, however, the approval was made subject to a definite proviso reserving the right to impose such limitations or restrictions as the Commission might find necessary in order to insure that the service performed "shall be auxiliary or supplementary to the train service" of the railroad, and shall not unduly restrain competition. The certificate issued in each of these proceedings except in No. MC-89913 (Sub-No. 10) does not contain this limitation. The certificate in No. MC-89913 (Sub-No. 10), although it carries no restriction as to the character of the motor service authorized, does contain a

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[5] Pursuant to the findings in *Frisco Transp. Co. Common Carrier Application*, 18 M. C. C. 826, a certificate, No. MC-89913, was issued the Transportation Company on March 2, 1940, authorizing it to transport general commodities, with exceptions, from Paris to Hugo, serving all intermediate points. The findings in that proceeding do not contain any restriction as to the character of service authorized, or any reservation of a right later to restrict in any manner. On March 31, 1942, a consolidated certificate was issued the Transportation Company embracing the operating authority granted pursuant to the findings in the cited proceeding and those acquired through purchase from J. A. Rose.

specified reservation of a right in this Commission later to restrict for the purpose indicated.

Before discussing the matters raised on petition and at the oral argument, it may be well to review briefly the events which preceded the instant proceedings. In July, 1941, Campbell Sixty-Six Express, Inc., and certain other motor common carriers filed a complaint alleging that the Transportation Company, with the cooperation of the railroad, was conducting certain operations as a motor common carrier, in interstate or foreign commerce, in violation of section 206 (a) and other sections of the Interstate Commerce Act, and has willfully failed to comply with our orders, rules and regulations governing motor common carrier operations. In *Campbell Sixty-Six Exp., Inc.*, v. *Frisco Transp. Co.*, 43 M. C. C. 641, a majority of division 5 found that certain certificates under which the Transportation Company was operating authorized the performance only of service which was strictly auxiliary or supplementary to the rail service of the railroad, and that the performance of a direct motor-carrier service to the public was unauthorized and should be discontinued. No order was entered, but the division stated that certain proceedings in which certificates were issued to the Transportation Company would be reopened for the purpose of determining what, if any, conditions or restrictions should be imposed in the certificates to remove all doubt about the character of operations which the Transportation Company was authorized to acquire and in which it is authorized to engage. Subsequently, division 5, on its own motion, reopened the proceedings covered by this report for reconsideration and thereafter they were reopened for further hearing. In our report on oral argument in *Campbell Sixty-Six Exp., Inc.* v. *Frisco Transp. Co.*, 46 M. C. C. 222, hereafter called the *Campbell Sixty-Six case*, we disapproved the division's finding that the Transportation Company had been engaged in operations unauthorized by the certificates as then phrased, but stated (page 225):

Nothing that we say here, however, should be taken as an indication that the certificates now held by the Transportation Company may not be corrected to reflect the intent of the findings in the acquisition proceedings or that restrictions may not be imposed now in some or all of the certificates held by the Transportation Company which will have the effect of limiting the service thereunder to that which is auxiliary to or supplementary of the rail service of its parent company and preclude it from performing a direct and independent motor common carrier service. Whether the certificates held by the Transportation Company, which do not contain the conditions imposed in the acquisition proceedings, were inadvertently issued is not here determined. Since the prior report, a number of the proceedings pursuant to which certificates were issued to the Transportation Company have in fact been reopened for further hearing. The conditions, if any, which may and should be imposed will be considered in the reopened proceedings.

As seen, the certificate issued to the Transportation Company in No. MC-89913 (Sub-No. 10) contains a provision stating that the operations authorized are subject "to such further limitations, restrictions, or modifications" as we may find it necessary to impose, in order to insure that the service "shall be auxiliary or supplementary to the train service" of the railroad. There is now no question that we may, if we find it necessary, impose limitations or restrictions as to the service to be rendered under this certificate. See *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, hereafter called the *Rock Island* case. Whether any limitations or restrictions should be imposed will be hereinafter discussed.

The first and most important issue to be determined is whether the omission from the certificates issued to the Transportation Company in Nos. MC-89913 (Sub-No. 1),

MC-89913 (Sub-No. 2), MC-89913 (Sub-No. 3), MC-89913 (Sub-No. 5), and MC-89913 (Sub-No. 6), of the condition imposed by division 5 in its findings in the finance reports, reserving the right to impose such further limitations or restrictions as we may find necessary to impose in order to insure that the service shall be auxiliary or supplementary to train service, prevents us from exercising that right without contravening the provisions of section 212 (a)[6] of the Interstate Commerce Act. The division found that the certificates here in issue, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase; that to the extent that the certificates issued fail to reflect the character of authority contemplated by the findings, such deficiency or deviation from the findings was inadvertent and, consequently, the certificates, departing as they do from the findings in the finance reports, were inadvertently issued; that under these circumstances the certificates may be revoked, and certificates in accord with such findings may be issued, without proceeding in accordance with the provisions of section 212 (a); and that no diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved.

In its petition, the Transportation Company renews its motion to discontinue the instant proceedings and also re-

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[6] Section 212 (a) provides in substance that certificates shall remain in effect until suspended or terminated as provided in the section. They may "upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, * * *." It further provides for a minimum of 30 days in which the holder may comply with a lawful order commanding obedience thereto.

news its objections to certain evidence adduced at the hearing. The motion to discontinue the proceedings is based on the ground that the Transportation Company made no request for the hearing; that the notice thereof did not inform it of the purpose of the hearing; that it has not had a full hearing; that no evidence has been adduced to show the need for the imposition of the conditions set forth in appendix B attached; and that it has been denied due process of law. Whether or not the Transportation Company requested the hearing is of no moment, for our power to reopen the instant proceedings is not dependent upon a request therefor by it. Some of the other contentions were discussed by the division in the prior report on page 422. We see no need to repeat them herein. Further, no arguments have been advanced by the Transportation Company which would cause us to reverse the above-mentioned rulings of the examiner and of the division. In the circumstances, they are affirmed.

The Transportation Company argues that the claimed inadvertence in the issuance of the certificates is contrary to the law and to the facts. The facts leading to the issuance of the certificates in question are relatively simple, are not disputed, were set forth in some detail in the prior report, and have been reviewed briefly herein. As heretofore stated, division 5, after formal hearings, authorized the Transportation Company to purchase the operating rights heretofore described, but in each instance, however, "the approval was made subject to a definite proviso reserving" the right to impose such limitations or restrictions as we might find necessary in order to insure that the service performed "shall be auxiliary or supplementary to the train service" of the railroad. Except with respect to the certificate issued in No. MC-89913 (Sub-No. 10), none of the certificates contain such a limitation. The Transportation Company points out, and correctly so, that in each of the proceedings included herein except in No. MC-89913 (Sub-No. 10), a so-called compliance order was issued

by division 5 in each such proceeding shortly after the authorized purchase had been consummated. Thus, so-called compliance orders were issued in March 1939, in No. MC-89913, subnumbers 1, 2, and 3, in June 1939, in No. MC-89913 (Sub-No. 5), and in July 1939, in No. MC-89913 (Sub-No. 6). These compliance orders do not contain the above-described limitation, hereafter called the limitation, which was contained in the findings in each of the finance proceedings. The Transportation Company argues in effect that the certificates issued were based on the compliance orders and therefore that they were not inadvertently issued, citing in support thereof, *Hudson Bus Transp. Co., Inc., Common Carrier Application,* 46 M. C. C. 9.

In the cited case, certain carriers petitioned for the revocation of Hudson's certificate on the ground that it inadvertently omitted a seasonal restriction and failed to specify certain streets over which the operation was to be conducted. Division 5, following the principle of the findings in *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465, 42 M. C. C. 211, held that a certificate which has been issued and allowed to become final and effective without objection by interested parties, is conclusive against protestants in the absence of fraud, misrepresentation, or inadvertence on the part of the Commission, in other words, that there has to be an end to litigation. The division found that the fact "that Hudson was found entitled to a somewhat different and larger operating authority than that originally requested by its predecessors does not constitute error, for our power to grant authority in excess of that requested by them is clear." In effect, therefore, the division found, which is not the case here, that the certificate described the exact operations it had intended to authorize. There was no fraud or misrepresentation, and no inadvertence in the issuance of the certificate to Hudson. Pertinent in this connection is the following comment in respect of the correction of errors from the Supreme

Court's decision in *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424:

> We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct. * * * Thus, it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the *Foss case*. * * *

Acceptance by the Court of our power to revise a certificate which was inadvertently issued is clearly implied in this language. As seen, however, it held only that our action there did not involve the mere correction of a clerical error, but represented an effort to invoke a newly conceived policy.

As pointed out by the Transportation Company, none of the compliance orders issued in No. MC-89913, subnumbers 1, 2, 3, 5, and 6, hereafter collectively called the five proceedings, contained the limitation. The limitation, however, was specifically included in the findings in each of the finance proceedings wherein the division authorized the Transportation Company to purchase certain motor-carrier rights. Thus the error, if it be an error, occurred first in the compliance orders. The certificates issued in each of the five proceedings merely followed the compliance orders and do not include the limitation.

Admittedly, in each of the finance proceedings the Transportation Company disclosed a desire, if permitted to do so, to continue all-motor service independently of the rail road, but in each proceeding it built its case primarily on the railroad's need for an auxiliary motor service, which would enable the railroad to improve its less-than-carload rail freight service, and upon the public benefits to be de-

rived from a coordinated motor-rail service. In each case, division 5 disapproved the proposed independent all-motor operations and approved the proposed acquisitions only to enable the Transportation Company to perform service auxiliary to, or supplemental of, the rail service of the railroad, as is abundantly shown by the discussion in each report. As heretofore stated, approval of the purchase in each instance was made subject to the limitation. There is now no question that approval of motor-carrier operating rights by a railroad purchaser may be conditioned on the said purchaser's "willingness to accept a narrower certificate than that possessed by the seller." See the *Rock Island* case, *supra*. In none of the finance proceedings authorizing the purchases here in issue did the Transportation Company object to the conditions upon which the purchases were approved and, as seen, it consummated the transactions shortly after the approval in each instance.

May the findings of each of the finance proceedings specifically authorizing the approval of the purchase subject to the limitation be changed so as to eliminate any condition contained in the findings, except through a formal supplemental report, report on reconsideration, or a modifying order in the specific proceeding authorizing the said purchase? We think not. It would neither be fair nor equitable to the parties to the proceeding or to the general public to permit any such change other than in the manner specified. There has not been any type of report or order modifying the findings in any of the finance proceedings listed in part II of appendix A. The compliance order issued in each of the five proceedings sets forth the operating rights which the Transportation Company had been authorized to purchase, and in each instance omitted the limitation. In other words, each of the compliance orders and of necessity the certificates based thereon authorized operations greater than those for the performance of which the division authorized the purchase.

We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. Under these circumstances the certificates may be revoked, and certificates in accord with such findings issued, without proceeding in accordance with the provisions of section 212 (a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved.

We might properly revoke or amend the certificates, except that issued in the No. MC-89913 (Sub-No. 10), and issue new or amended certificates containing a specific recital of the reserved right to impose further limitations or restrictions to insure that future service of the Transportation Company over the routes here involved shall be limited to service which is auxiliary or supplementary to the rail service of the railroad, and then, after issuance of such new or amended certificates, consider the further question whether the reserved right should be exercised, and, if we should find that it should be exercised, thereafter issue amended certificates containing such further limitations or restrictions. Such a course, would, however, be unnecessarily cumbersome considering the fact that a full and fair hearing already has been held for the purpose of determining what, if any, limitations or restrictions should be imposed. In view of this we shall proceed now, as did the examiner and the division to the broader question as to whether we should exercise the reserved right and impose limitations or restrictions. We have usually imposed five conditions in certificates authorizing auxiliary or supplementary service, and these will now be discussed separately in the light of the evidence of record.

Condition 1.

This condition, if imposed, would in general terms limit the character of service which the Transportation Company may perform to that which is "auxiliary to, or supplemental of," the rail service of the railroad. These terms were defined in *Texas & Pacific M. Transport Co., Com. Car. Application*, 41 M. C. C. 721, and approved in the *Rock Island* case and others. Further explanation here is unnecessary. The Transportation Company vigorously opposes this condition, contending that in reliance upon its unrestricted certificates and upon certain correspondence with our Bureau of Motor Carriers relative to the filing of tariffs which indicated that its status was to be that of an ordinary motor carrier, it greatly expanded its operations in the years following its acquisitions; and that to restrict them now to a service solely auxiliary or supplementary to train service would destroy its investment, and in effect constitute the taking of its property without the process of law.

At the time of the hearing, the Transportation Company's assets had increased from $109,540 to $1,083,871, and its capital stock investment from $100,000 to $450,000. Its employees increased from 4 to 763, its trucks and tractors from 4 to 318, and its trailers from 4 to 458. Its all-motor tonnage has increased from 11,585 tons to 117,521 tons, and its joint rail-motor tonnage from 10,438 to 158,212 tons. The foregoing are, however, system figures which cover operations very much more extensive than those over the comparatively short route segments here involved. Based upon a traffic and revenue study over a 7-day period in February 1946, the Transportation Company estimates that it handles 8,868,080 pounds of traffic yearly in all-motor service over the particular route segments here involved, and that the loss thereof would represent a loss of over $73,100 in revenue. This admittedly, however, presupposes a total loss of such traffic.

We do not believe that the record justifies a conclusion that there will be a total loss of the above-described traffic. It may be that some of the tonnage will be diverted to the railroad and handled by the Transportation Company. Nor does the record justify a conclusion that imposing condition 1 in the certificates as set forth in our findings herein would destroy the Transportation Company's investment. As stated, the Transportation Company holds certificates authorizing operations over several thousand miles of routes, of which about 284 miles are involved in the instant proceedings. That the imposition of condition 1 in the certificates named in the findings herein will have some effect on the Transportation Company's investment is obvious. That the Transportation Company could not have been unaware that there was some question concerning the type of operation it could render under the rights which it was authorized to purchase in the finance proceedings listed in part II of appendix A is, we believe, also obvious. First, the findings in each of the finance proceedings in question specifically authorized the approval of the purchases subject to the limitation. Later, the type of operations conducted by the Transportation Company were the subject of a complaint in the *Campbell Sixty-Six* case heretofore discussed.

In the circumstances, the Transportation Company at the very least was put on notice that there were questions concerning the type of operations which it could perform and it cannot now successfully claim any equities because of its having made investments without first taking appropriate steps to remove the doubts which existed. Concerning the imposition of condition 1 and the other conditions generally set forth in appendix B attached, the Supreme Court in the *Rock Island* case stated:

> The Commission has continually evidenced * * * by opinon and certification its intention to have rail-

owned motor carriers serve in auxiliary and supplemental capacity to the railroads.

* * * * * * *

Such restrictions hamper railroad companies in the use of their physical facilities—stations, terminals, warehouses—their personnel and their capital in the development of their transportation enterprises to encompass all or as much of motor transportation as the roads may desire. The announced transportation policy of Congress did not permit such development. [Footnote omitted.] We hold the new conditions are within the limits covered by the reservation of power to impose such further limitations as might be found necessary "to insure that the service shall be auxiliary or supplementary to the train service" of The Chicago, Rock Island and Pacific Railway Company.

We conclude that appropriate conditions should be imposed in the certificates held by the Transportation Company so as to return the operations to their proper and intended sphere, namely, a service auxiliary or supplementary to rail service. To that end, condition 1 will be added to the certificates here involved, with the exception discussed immediately below and with the exception of the certificate in No. MC-89913 (Sub-No. 2). The latter certificate, as seen, involves only an operation from Hugo to Paris, a distance of some 26 miles, and is physically isolated from the other routes. The Transportation Company's certificate in No. MC-89913 covers the operation in the reverse direction, namely, from Paris to Hugo, and authorizes service to and from all intermediate points. The certificate in No. MC-89913 contains no limitations or restrictions of any kind nor does it contain any reserved right to restrict. In the circumstances, the certificate issued in No. MC-89913 (Sub- No. 2) will not be revoked and the further discussion herein does not of course apply to such certificate.

Condition 2.

This condition would limit the authorized service to points that are stations on the rail lines of the railroad, and is calculated, together with condition 3, to implement and further the intent of condition 1. The only point on the routes embraced herein that is not a station on the rail lines in Dyess, Ark., a small community located 7 miles from the nearest station. The division found that condition 2 should be imposed on the involved operations except that neither condition 2 nor 1 should apply to operations to or from Dyess for the reasons stated in *Texas & Pac. Motor Transport Co. Ext.—Point Blue, La.*, 47 M. C. C. 425.

The Transportation Company points out that to serve Dyess as an "independent motor carrier" means that that town would necessarily appear in many motor-carrier tariffs to which it is a party and that it would entail considerable expense. The Transportation Company contends that it is impractical and uneconomical to "hold out" to perform one kind of service at a small town like Dyess and another and restricted service at other contiguous points. If the Transportation Company does not desire to continue serving Dyess, it may of course request permission to abandon and discontinue such service and for cancellation of its authority in this respect. Permission has been granted in those instances where it is shown that the public interest would not be injuriously affected by the abandonment. See *Frisco Transp. Co. Extension—Lake City, Ark.*, 42 M. C. C. 677.

Condition 3.

As stated above, this condition supplements and implements condition 1. The divsion found that a key-point restriction should be imposed. The division further found that to be effective the latter restriction necessarily requires the naming of a number of points as key points which are not located on the particular routes here in issue but which are on connecting routes; and that the naming of such

points will not operate as a limitation or diminution of the authorized operations over the latter routes, citing *Rock Island Motor Transit Co. Extension—Trenton, Mo.*, 43 M. C. C. 470. It named the key points listed in condition 3 of appendix B.

In its petition, the Transportation Company in particular objects to the naming of any key points not located on the routes here in issue. It asserts that the key points named by the division would prohibit it from transporting freight at motor rates and on motor billing (1) between St. Louis or Kansas City and Oklahoma City or Dallas by utilizing the routes authorized in Nos. MC-89913 (Sub-No. 1) and MC-89913 (Sub-No. 3), and (2) between Kansas City or Springfield and Memphis by utilizing the routes authorized in Nos. MC-89913 (Sub-No. 5) and MC-89913 (Sub-No. 6). It argues that its right to serve between St. Louis or Kansas City and Oklahoma City or Dallas or between Kansas City or Springfield and Memphis, did not arise under any of the certificates here in issue, but that such right was authorized in *Frisco Transp. Co.—Purchase—Reddish*, 35 M. C. C. 132, *Frisco Transp. Co.—Purchase—Ozark Truck Lines, Inc.*, 35 M. C. C. 255, and others, wherein its was authorized to purchase certain operating rights which were "authorized to be unified with rights otherwise confirmed in applicant [the Transportation Company]."

The above argument is without merit. The Joplin-Miami route is one of the routes embraced in the instant proceedings and constitutes, for example, a connecting segment between the Transportation Company's routes east of Joplin into Springfield, Kansas City, St. Louis, and Memphis, and those west of Miami into Oklahoma City and Dallas. In other words, the Joplin-Miami route must be used to enable the Transportation Company to perform an all-motor service over the extremely long routes between St. Louis, Memphis, and Kansas City, on the one hand, and Dallas and Oklahoma City on the other. For the reasons

heretofore discussed, we concluded that the certificate, No. MC-89913 (Sub-No. 1), covering the Joplin-Miami route, was inadvertently issued, in that it did not contain a specific recital of the reserved right to impose further limitations or restrictions to insure that future service of the Transportation Company over this route shall be limited to service which is auxiliary or supplementary to the rail service of the railroad. The naming of key points is necessary to insure that the future service over the routes shown in the findings herein will be truly auxiliary or supplementary to rail service. The key points named herein will not affect any of the Transportation Company's operations "that do not involve also a movement over the routes which are the subject of the instant proceedings."

For the reasons discussed at some length by the division in its report beginning at page 431, it concluded that the key points listed in appendix B attached should be named. With the exception noted above, neither the Transportation Company nor any other party has raised any specific questions concerning the key points named by the division. In the circumstances, we conclude that the findings of the division respecting the named key points should be affirmed.

Conditions 4 and 5.

Condition 4 provides that all contractual arrangements between the Transportation Company and the railroad shall be reported to us and be subject to revision as found necessary in order that the arrangements shall be fair and equitable to the parties. In matters relating to compensation between the two companies, the railroad will in reality be dealing with itself and, so far as ultimate financial results to it are concerned, it is immaterial what these arrangements may be. It is important, however, that they be properly adjusted if this Commission and the general public are to know or have the means of ascertaining the cost to the railroad of the services performed by the

Transportation Company. Such information might be important in a rate proceeding or otherwise. See *Kansas City S. Transport Co., Inc., Com. Car. Application*, 10 M. C. C. 221. Accordingly, this condition should be imposed.

Condition 5, which will also be imposed, reserves to us the right in the future to make such further changes or modifications in the conditions as may be necessary in order to make certain that the motor service remains auxiliary or supplementary to the rail service.

Findings.

Upon oral argument:

We find that the certificates issued to the Frisco Transportation Company in the proceedings listed in part I of appendix A hereto, except No. MC-89913 (Sub-No. 10), were inadvertently issued; that such certificates, except No. MC-89913 (Sub-No. 2), should be canceled and at the same time new or amended certificates should be issued in conformity with the findings in the proceedings listed in part II of appendix A, except No. MC-F-619, and which require that all future operations conducted thereunder shall be subject to the limitations or restrictions as described in appendix B attached; and that the certificate issued in No. MC-89913 (Sub-No. 10) should be modified so as to require that all future operations conducted thereunder shall be subject to the limitations or restrictions as described in appendix B attached.

We further find that the certificate issued to the Frisco Transportation Company in No. MC-89913 (Sub-No. 2) requires no modification.

An appropriate order will be entered.

Mitchell, *Commissioner*, dissenting:

In *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, the Supreme Court was called upon to determine

whether or not the Commission had the power to further restrict a certificate where it had specifically reserved the right in that instrument and whether or not it could insert into a vendee's certificate a restriction not contained in vendor's certificate. Although those issues are different from those involved herein, the following language of the Court is appropriate to this proceeding:

> But power in the Commission, before issuance of a certificate or approval of acquisition, to limit railroad motor operations so as to make them auxiliary and supplemental to rail service *does not necessarily imply power to change the conditions* designed to bring about the desired coordination, *after issuance of the certificate.* The parent railroad may have acquired or developed its motor affiliate in reliance on the conditions stated in the certificate. (Pages 433-434.) [Italics supplied.]
>
> When competition, public interest in the preservation of the inherent advantages of rails and motors, and use of motor service by railroads in their operations are the basis, as they are * * * for allowing acquisitions of motor routes by railroads, we think it consonant with that policy to reserve the right to make further limitations, restrictions or modifications to insure that the service remain auxiliary or supplemental. Congress could not have expected the Commission to be able to determine once and for all the provisions essential to maintain the required balance. *Such a reservation, of course, does not provide unfettered power in the Commission to change the certificate at will.* That would violate section 212, allowing suspension, change or revocation only for the certificate holders' willful failure to comply with the Act or lawful orders or regulations of the Commission. (Pages 434-435.) [Italics supplied.]
>
> * * * We will solve the problem by determining that the order approving the purchase has not the finality

> of a certificate but is rather only a tentative approach to the consummation of the purchase subject to changes in conditions and requirements. * * * This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. (Pages 445-446.)

The report of the majority bases our right to change the certificates involved herein on a finding that they were issued through inadvertence. It is interesting to note, according to the majority, that we inadvertently issued five separate and distinct certificates in five different proceedings which, although they involved the same carrier, were handled individually. If that be true, as the majority find, then some Bureau of this Commission was pretty careless in the manner in which it was handled. The record, in my opinion, does not justify the findings of the majority and, therefore, I respectfully dissent.

Alldredge, *Commissioner*, dissenting in part:

I agree with the conclusions of the majority in the Sub-No. 2 and Sub-No. 10 proceedings. In each of the remaining proceedings, division 5 entered orders approving the purchase by the Frisco Transportation Company of certain operating rights subject to the terms and conditions set out in the findings in the respective reports. In the findings of each of the reports is a *reservation* to the effect that the authority granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary to, or supplementary of, the train service of the parent railway company. Thereafter, in subnumbers 1, 3, 5, and 6, of docket No. MC-89913 (respectively assigned to embrace the rights purchased in MC-F-618,

MC-F-578, MC-F-678, and MC-F-679) division 5 entered orders directing that the Frisco Transportation Company be issued certificates upon compliance with certain conditions. Each of the last-mentioned orders was introduced by the phrase: "This proceeding coming on for further consideration." These orders specified the authority to be issued, but did not contain the reservation mentioned above; nor was the reservation placed in the certificates which were thereafter issued. A question is raised as to the power of the Commission now to put the above reservation in the certificates.

In *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, the Supreme Court, in connection with the power of the Commission to tighten the restrictions in a certificate of a railroad's motor-carrier affiliate, stated at page 445:

> This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such procedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected.

The majority has now undertaken such a procedure on the ground that the reservation was inadvertently omitted from the certificates. Such a position, it seems to me, is tenuous. Compare *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424. This does not mean, however, that I am of the opinion that nothing can or should be done. Section 208 (a) of the Interstate Commerce Act expressly provides that there shall, at the time of issuance and *from time to time thereafter*, be attached to the exercise of the privileges granted by the certificate such reasonable terms, con-

ditions, and limitations as the public convenience and necessity may require.

I would proceed under section 208 (a) of the act to attach to the certificates the conditions which the majority has found to be proper.

Commissioners Mahaffie and Knudson dissent.

Commissioner Tuggle did not participate in the disposition of these proceedings.

Appendix A.

Proceedings Covered by Report.

Part I.

No. MC-89913 (Sub-No. 1), Frisco Transportation Company Extension—Joplin-Miami.

No. MC-89913 (Sub-No. 2), Frisco Transportation Company Extension—Hugo-Paris.

No. MC-89913 (Sub-No. 3), Frisco Transportation Company Extension—Joplin-Carthage.

No. MC-89913 (Sub-No. 5), Frisco Transportation Company Extension—Memphis-Blytheville.

No. MC-89913 (Sub-No. 6), Frisco Transportation Company Extension—Memphis-Walnut Ridge.

No. MC-89913 (Sub-No. 10), Frisco Transportation Company Extension—Blytheville-Lake City.

Part II.

No. MC-F-578, Frisco Transportation Company—Purchase—Joseph D. Cooper. Prior Report: 15 M. C. C. 317.

No. MC-F-618, Frisco Transportation Company—Purchase—John Hamm. Prior Report: 15 M. C. C. 320.

No. MC-F-619, Frisco Transportation Company—Purchase—J. A. Rose. Prior Report: 15 M. C. C. 323.

No. MC-F-678, Frisco Transportation Company—Purchase—Joseph W. Parker. Prior Report: 25 M. C. C. 96.

No. MC-F-679, Frisco Transportation Company—Purchase—Louis Tolson. Prior Report: 25 M. C. C. 96.

Appendix B.

Limitations or restrictions which division 5 found in its report on further hearing 53 M. C. C. 415, should be imposed in certificates issued in proceedings listed in part I of appendix A.

1. The service to be performed by the Frisco Transportation Company, hereafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, hereafter called the Railway, except that this condition shall not apply with respect to Dyess, Ark.

2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Memphis, Tenn., and Amory-Tupelo (considered as one), Miss.

4. All contractual arrangements between the Transportation Company and the railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as in the future the Commission may find necessary to impose in order to in-

sure that the service shall be auxiliary to, or supplemental of, the train service of the railway.

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of December, A. D. 1953.

No. MC-89913 (Sub-No. 1)

FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-MIAMI

No. MC-89913 (Sub-No. 2)

FRISCO TRANSPORTATION COMPANY EXTENSION—HUGO TO PARIS

No. MC-89913 (Sub-No. 3)

FRISCO TRANSPORTATION COMPANY EXTENSION—JOPLIN-CARTHAGE

No. MC-89913 (Sub-No. 5)

FRISCO TRANSPORTATION COMPANY EXTENSION—MEMPHIS-BLYTHEVILLE

No. MC-89913 (Sub-No. 6)

FRISCO TRANSPORTATION COMPANY EXTENSION—MEMPHIS-WALNUT RIDGE

No. MC-89913 (Sub-No. 10)

FRISCO TRANSPORTATION COMPANY EXTENSION—BLYTHEVILLE-LAKE CITY

No. MC-F-578

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOSEPH D. COOPER

No. MC-F-618

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOHN HAMM

No. MC-F-619

FRISCO TRANSPORTATION COMPANY—PURCHASE—J. A. ROSE

No. MC-F-678

FRISCO TRANSPORTATION COMPANY—PURCHASE—JOSEPH W. PARKER

No. MC-F-679

FRISCO TRANSPORTATION COMPANY—PURCHASE—LOUIS TOLSON

It appearing, That on October 22, 1951, the Commission, division 5, entered its report, 53 M. C. C. 415, and order in the above-entitled proceedings, ordering that certain certificates of public convenience and necessity held by Frisco Transportation Company should be revoked because they were inadvertently issued, and that new or amended certificates should be issued in order to insure that the service rendered thereunder shall in the future be limited to that which is auxiliary to, or supplemental of, rail service;

It further appearing, That by order entered July 7, 1952, upon consideration of the records in the above-entitled proceedings, of petition filed by Frisco Transportation Company, and of the replies filed by certain parties thereto, the said proceedings were reopened for oral argument;

And it further appearing, That full investigation of the matters and things involved in these proceedings has been made; and that the Commission, on the date hereof, has made and filed a report on oral argument herein containing its findings of fact and conclusions thereon, which re-

port and the aforesaid report and order of October 22, 1951, are hereby referred to and made a part hereof;

It is ordered, That the order of October 22, 1951, be, and it is hereby, vacated and set aside.

It is further ordered, That the certificates heretofore issued to the Frisco Transportation Company in No. MC-89913 (Sub-Nos. 1, 3, 5, and 6) be, and they are hereby, cancelled; and that new or amended certificates be issued in lieu of those cancelled in conformity with the findings in Nos. MC-F-578, MC-F-618, MC-F-678, and MC-F-679, and that all future operations conducted thereunder shall be subject to the limitations or restrictions set forth in appendix B attached to the said report on oral argument.

And it is further ordered, That the certificate heretofore issued to the Frisco Transportation Company in No. MC-89913 (Sub-No. 10) be modified so as to require that all future operations conducted thereunder shall be subject to the limitations or restrictions as set forth in appendix B attached to the said report on oral argument.

By the Commission:

GEORGE W. LAIRD,
Secretary.

(SEAL)

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of April, A. D. 1955.

No. MC-89913 (Sub-No. 1)

FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-MIAMI

No. MC-89913 (Sub-No. 2)

FRISCO TRANSPORTATION COMPANY EXTENSION—
HUGO TO PARIS

No. MC-89913 (Sub-No. 3)

FRISCO TRANSPORTATION COMPANY EXTENSION—
JOPLIN-CARTHAGE

No. MC-89913 (Sub-No. 5)

FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-BLYTHEVILLE

No. MC-89913 (Sub-No. 6)

FRISCO TRANSPORTATION COMPANY EXTENSION—
MEMPHIS-WALNUT RIDGE

No. MC-89913 (Sub-No. 10)

FRISCO TRANSPORTATION COMPANY EXTENSION—
BLYTHEVILLE-LAKE CITY

No. MC-F-578

FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH D. COOPER

No. MC-F-618

FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOHN HAMM

No. MC-F-619

FRISCO TRANSPORTATION COMPANY—PURCHASE—
J. A. ROSE

No. MC-F-678

FRISCO TRANSPORTATION COMPANY—PURCHASE—
JOSEPH W. PARKER

No. MC-F-679

FRISCO TRANSPORTATION COMPANY—PURCHASE—
LOUIS TOLSON

Upon consideration of the records in the above-entitled proceedings, and of;

(1) Petition of applicant, dated February 2, 1954, for reconsideration of the Commission's report on oral argument of December 7, 1953;

(2) Joint reply of American Trucking Associations, Inc., and the Regular Common Carrier Conference, interveners in opposition, filed February 15, 1955;

(3) Joint reply of Be-Mac Transport Co., Inc., Consolidated Forwarding Co., Inc., Viking Freight Company, C. E. S. Truck Lines, Inc., L. A. Tucker Truck Lines, Inc., and Southern-Plaza Express Company, Inc., interveners in opposition, dated February 11, 1955;

(4) Reply of Campbell Sixty-Six Express, Inc., intervener in opposition, dated February 11, 1955;

(5) Petition of Southern-Plaza Express Co., Inc., for leave to intervene and for leave to adopt the reply filed by Be-Mac Transport Co., Inc., referred to in (3) above;

and good cause appearing therefor:

It is ordered, That said petitioner, Southern-Plaza Express Co., Inc., be, and it is hereby, permitted to intervene in said proceedings with the right to appear and participate in all further proceedings herein;

It is further ordered, that Southern-Plaza Express Co., Inc., be, and it is hereby, permitted to adopt the reply of Be-Mac Transport Co., Inc., et al.;

It is further ordered, That said petition for reconsideration be, and it is hereby, denied, for the reason that the petition raises no issue of law or fact requiring a change in the findings in the report or oral argument, decided December 7, 1953.

By the Commission:

HAROLD D. McCOY,
Secretary.

(SEAL)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~637~~ 16

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY, *Appellee.*

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

REPLY OF APPELLANTS TO MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 637

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY, *Appellee.*

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

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REPLY OF APPELLANTS TO MOTION TO AFFIRM

Now come the appellants in the above-entitled cause, the Railway Labor Executives' Association, et al., pursuant to Rule 16, paragraph 3 of the Revised Rules of this Court to reply to the motion of the appellee Frisco Transportation Company to affirm the judgment of the District Court.[1]

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[1] The motion is also addressed to the appeal of American Trucking Associations, Inc., et al., in Case No. 636, and the Interstate Commerce Commission in Case No. 651.

I.

Authority of Commission to Condition Railroad Purchased Motor Carrier Certificate Where Reservation of Authority is Contained Only in Order Approving the Purchase.

In *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, the Court sustained the power of the Commission to reopen an acquisition proceeding and condition the purchased motor carrier certificates of a railroad subsidiary so as to make operations thereunder auxiliary to or supplemental of the railroad's train service where authority to do so was contained in the certificates or the certificates had not yet been issued. The Court left open for future determination upon "a fully developed statement and argument by the interests affected" the validity of such Commission action where the reservation is not contained in the order directing the issue of the certificate or the certificate itself.

The present case presents the issues of whether (a) the reservation is in the order directing the issue of the certificate when it appears in the order approving the purchase, and (b) whether, in any event, it is sufficient if the reservation appears only in the approval order. If either of these questions are answered in the affirmative, the judgment of the District Court is in error and the authority of the Interstate Commerce Commission has been erroneously impaired in important respects. Such issues are obviously substantial requiring this Court's full consideration. The *Rock Island* decision so recognizes.

Appellee argues that no substantial issue is involved because it says that the "compliance order" is the order directing the issue of the certificate and that the reservation of authority was not contained in said

order (Motion, 22-23). The so-called "compliance order", an example of which is attached to the motion as Appendix 1 (Motion, 31), is an instrument of a routine procedure for the issuance of certificates and is simply a kind of tentative certificate which is issued unless the licensee objects. As such, it clearly is not the basic source of the authority which the appellee received. That source is the orders approving the purchases in which the reservation appeared.

Moreover, as appears from Appendix 1 of the motion, the "compliance order" recites that there has been an approval of a purchase "as provided in Section 213 of the Motor Carrier Act, 1935" (Motion, 31) and that "applicant shall not engage in any motor carrier operations not described herein *or otherwise lawfully authorized*". (Motion, 32, emphasis supplied.) All that had been lawfully authorized by the orders approving the purchases was for appellee to take over the routes and operations of the vendors and provide a coordinated rail-truck service upon the basis of representations that this was appellee's purpose in making the purchases (Jur. Stat. 8-10). Under such circumstances, appellants submit that it is wholly unreasonable for appellee to contend as it does that the "compliance orders" were intended as Commission action reversing its Division 5 and granting appellee unrestricted operating rights. Appellee had not appealed the Division 5 orders in accordance with Interstate Commerce Commission rules, but rather by its own admission (Motion, 6) had accepted those orders, including the reservation of authority contained therein, and completed its purchases.

In addition, appellee's argument ascribes to the Commission the exercise of an authority beyond that

agency's power as limited by the proviso in former Section 213(a)(1) and present Section 5(2)(b) of the Interstate Commerce Act. Appellee says that "the Commission has never held that it did not have the power to issue unrestricted certificates to a rail-affiliated motor carrier." Indeed, the appellee goes much further and argues that in a Section 5(2) proceeding the Commission may authorize a completely independent railroad-controlled truck service without regard to the carrier's rail service (Motion, 24-26). To the contrary, the Commission has squarely held that it has no discretion to relax the requirements of Section 5(2)(b) in acquisition proceedings such as those in which appellee acquired its motor carrier certificates. In *Cincinnati, N. & C. Ry. Co.—Control—Lehigh Valley Transit*, 57 M.C.C. 41, the Commission stated (pages 49, 51, 52):

> "Applicants further contend that, assuming applicants are affiliated with the railway, it is not necessary that we find that the motor-vehicle service of the carriers of which control would be acquired would be used to public advantage by the railway in its operations, because the literal requirements of the proviso of section 5(2)(b) can be relaxed in order to carry out the declared national transportation policy. * * *
>
> * * *
>
> "Apparently applicants concede that they are unable to submit evidence sufficient to meet the proof requirements of the proviso of section 5(2)(b), the application contains no such evidence, and it is not apparent to us how those requirements can be met in view of the location of the railway, the nature of the service which it renders, and the location of the motor bus carriers which the partnership would indirectly control. We do not agree with the position of applicants that we are empowered to relax the specific requirements

> of the statute and find that this transaction would be consistent with the public interest, without also finding that the railroad would be enabled to use service by motor vehicle to public advantage in its operations. As stated in *ET & WNC M. Transportation Co.—Lease—Imperial Transp. Co. Inc.*, 5 M.C.C. 196: 'Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation.' "

These requirements have been interpreted by the Commission to mean that the motor carrier service of a railroad or its subsidiary must be auxiliary to or supplemental of the train service of the railroad, in contrast to an unrestricted independent truck service, and such interpretation has been sustained by this Court. *American Trucking Associations, Inc., et al.* v. *United States*, 355 U.S. —, 2 L. Ed. 2d 158, 163 (decided December 9, 1957).[2] There is no contention in this case that the operations of appellee as authorized by the lower court judgment are auxiliary to or supplemental to the train service of the Frisco Railroad. In fact, the Commission imposed the restrictive conditions involved because the operations were not those of a coordinated rail-truck service and in order to make them so.

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[2] Also see Mr. Justice Frankfurter's separate opinion in *Schaffer Transportation Co.* v. *United States*, 355 U. S. —, 2 L. Ed. 2d 117, 124, decided December 9, 1957, in which there is compared the narrowly specific provisions of the Interstate Commerce Act, such as Section 5(2)(b), leaving practically no scope in their application, with broader provisions of that statute.

II.

Effect of Inadvertence Upon the Commission's Authority.

Assuming that it is insufficient for the Commission to reserve authority in its orders approving railroad purchases of motor carriers to impose future conditions to keep the operations auxiliary to or supplemental of the railroad's train service, the further issue is presented of what effect the inadvertent omission from the subsequent "compliance orders" and certificates has on the Commission's power. The District Court held that it made no difference since the Commission was prevented by the decision in *Watson Bros. Transportation Co.* v. *United States,* 132 F. Supp. 905, aff'd 350 U.S. 927, from imposing the conditions involved. The appellee attempts to avoid this issue by arguing that the court below did not hold that the Commission had no power to correct clerical error, but that the Commission's action amounted to more than such a correction, and that for such reason the court examined the evidence (Motion, 23). However, this is merely another way of disagreeing with the Commission's conclusion that the omission of the reservation from the certificate and compliance order was inadvertent. That ground of the District Court's decision is embodied in its finding that the Commission's conclusion of inadvertence is not supported by adequate evidence (Jur. Stat. Appendix B, 30a). The court below also held as an alternative ground for decision not dependent on its evaluation of the evidence that the agency's action constituted an invalid revocation of appellee's certificates (Jur. Stat., Appendix B, 30a). This holding could not have been made as an independent ground for reversing the Commission

unless the agency's action was invalid even if the omission was inadvertent.

Appellants submit that the holding of the District Court that the Commission had no power to impose the conditions raises a substantial issue with respect to the scope of the agency's power where the omission of the reservation from the certificate is the result of an inadvertence. Such holding also puts in question the agency's power generally to correct errors in certificates.

III

Adequacy of the Evidence Supporting Inadvertence.

The lower court's action in substituting its judgment for that of the Commission on the inadvertent nature of the omission of the reservation of authority from the compliance orders and certificates is contrary to all established principles for review of administrative orders and requires correction by this Court. Appellee tries to support the decision below on this point by arguing that no Commission employee testified as to the matter and that the agency simply inferred inadvertence (Motion, 20-21). However, there was clearly no necessity for such testimony. Appellee's argument before the Commission and in the courts is that the compliance orders and certificates represented deliberate agency action changing the limited nature of the approval given in the purchase proceedings. This is not a matter of testimony by a Commission employee or inference. It is a matter of what the agency did at the time it acted and the Commission's declaration thereon embodied in formal findings controls unless the appellee could point to evidence showing such declaration to be con-

trary to fact. A claim that the Commission's acquisition orders were deliberately revised by the certificates requires proof from the appellee and it has no proof beyond the documents themselves. This is clearly insufficient in the light of the agency's finding, particularly when the compliance orders recited the issuance of the purchase approval orders and told appellee that it could engage in only those operations listed and "otherwise lawfully authorized."

CONCLUSION

For the reasons set forth in the Jurisdictional Statement and this reply, the motion to affirm should be denied, jurisdiction noted, and the judgment below reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 16

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY, *Appellee.*

On Appeal From the United States District Court for the Eastern District of Missouri, Eastern Division

BRIEF FOR APPELLANTS RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

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BRIEF FOR APPELLANTS RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

OPINIONS BELOW

The opinion of the District Court (R. 163-172) is reported at 153 F. Supp. 572. The opinion and order of the Interstate Commerce Commission (R. 593-617) are reported at 62 M.C.C. 367. The order of the Commission on reconsideration (R. 18-20) is unreported.

JURISDICTION

The judgment of the District Court was entered on August 9, 1957 (R. 175). Notice of appeal was filed by the Railway Labor Executives Association, et al, intervening defendants below, on October 8, 1957 (R. 188), and the appeal, designated as Case No. 637, was docketed in this Court on December 3, 1957. This Court on February 3, 1958, noted probable jurisdiction and consolidated the appeal with Cases Nos. 15 and 19. (R. 194). The jurisdiction of the Court to review the judgment of the District Court by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code. (28 U.S.C. 1253 and 2101(b)).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Does the Interstate Commerce Commission have authority, after notice and hearing, to impose conditions on motor carrier certificates of a wholly-owned subsidiary of a railroad for the purpose of insuring that the operations of the subsidiary are auxiliary to or supplemental of the parent railroad's train service under circumstances where:

(a) the operating rights represented by such certificates were acquired by the railroad subsidiary through purchase of independent motor carriers subject to the approval of the Interstate Commerce Commission under Section 213 (now Section 5 (2)) of the Interstate Commerce Act, which permits agency approval of such purchases only upon a finding that the parent railroad can use the motor carrier service to public advantage in its train operations;

(b) the Commission approved the purchases on the basis of findings that the railroad subsidiary proposed

to operate a coordinated rail-truck service and in accordance with said findings included in its reports and orders a condition that the approval was subject to such further limitations or restrictions as the agency might thereafter find necessary to impose in order to insure that the truck service be auxiliary to or supplemental of the parent railroad's train service;

(c) the reservation of authority contained in the Commission's reports and orders approving the purchases was not inserted in the certificates issued pursuant thereto.

2. If Question 1 is answered in the negative, the further question is presented as to whether the Commission had authority to take such action in the enumerated circumstances where the reservation of authority contained in the reports and orders approving the purchases was omitted from the certificates issued pursuant thereto through inadvertence.

3. If Question 2 is answered affirmatively, a further question is presented as to whether there was adequate evidence to support the Commission's finding that the reservation of authority was inadvertently omitted from the certificates.

STATUTES INVOLVED

This appeal primarily involves the National Transportation Policy, (49 U.S.C. preceding Section 1), Section 5 (2)(b), Section 212(a), and former Section 213(a)(1) of the Interstate Commerce Act. These statutory provisions are set forth in full in Appendix A hereto. Other applicable statutory provisions are cited or quoted at appropriate places in the brief.

STATEMENT

This appeal is from a judgment of a statutory three-judge court which held invalid an order of the Interstate Commerce Commission imposing conditions upon various motor carrier certificates of the Frisco Transportation Company (hereinafter called "the Transportation Company), designed to limit operations thereunder to services auxiliary to or supplemental of train services of the company's parent, the St. Louis-San Francisco Railway Company, (hereinafter called "the Frisco Railroad).[1]

---

[1] The conditions imposed were as follows: (R. 614)

1. The service to be performed by the Frisco Transportation Company hereinafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, except that this condition shall not apply with respect to Dyess, Arkansas.

2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Memphis, Tenn., and Amory-Tupelo (considered as one), Miss.

4. All contractual arrangements between the Transportation Company and the railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the railway.

The certificates involved authorized motor carrier services over four segments of Transportation Company's routes. The rights covering these segments were purchased by Transportation Company from prior independent operators and are identified in the Interstate Commerce Commission proceedings and the opinion below by the vendor's name. They are (1) the "Cooper" route between Joplin and Carthage, Missouri; (2) the "Hamm" route between Miami, Oklahoma and Joplin, Missouri; (3) the "Tolson" route between Walnut Ridge, Arkansas, and Memphis, Tennessee; and (4) the "Parker" route between Blytheville, Arkansas, and Memphis, Tennessee.[2] Section 213 of the Interstate Commerce Act (now Section 5(2))[3] required Transportation Company to obtain the approval of the Interstate Commerce Commission for its purchases of these routes. Paragraph (a)(1) of that section contained the following requirements as to the findings which the Commission must make as a condition precedent to its approval of transactions subject thereto:

> "* * * If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and condi-

[2] The Commission's action also covered a fifth segment known as the "Bennett" route between Blytheville and Lake City Arkansas, which is not involved in the appeal.

[3] Section 213 (49 U.S.C. 313) was repealed by the Transportation Act of 1940, Section 21(e) [54 Stat. 924], and the substance carried forward into Section 5(2).

tions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however, That if a carrier as defined in section 1(3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5(8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.*" (Italics supplied)

Transportation Company was and is the wholly-owned subsidiary of the Frisco Railroad, a carrier within the meaning of Section 1(3) of Part I of the Interstate Commerce Act [49 U.S.C. 1(3)]. (R. 164) Consequently, the Commission could legally approve Transportation Company's purchase of the segments involved only if the transactions met the test of the above quoted proviso in Section 213(a)(1). The Commission has long interpreted this proviso to limit acquisitions of motor carrier operations by railroads or railroad subsidiaries to those which are auxiliary to or supplemental of the railroad's train service. *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 437 (1951); *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 5 M.C.C. 9, 11, 12 (1937).

In acting upon Transportation Company's applications for approval of its proposed acquisitions, the Commission gave full effect to such restrictions on its authority.

In *Frisco Transportation Company—Purchase—Cooper*, 15 M.C.C. 317 (1938), the Commission (Div. 5) considered Transportation Company's application for approval to acquire the "Cooper" route. At page

318 of its report granting such approval, the Commission made the following finding:

> "The authority herein sought is desired to afford applicant and the railway means for developing coordinated rail truck service with a view toward retrieving some of the substantial volume of less-than-carload freight directed from the railway to competing highway carriers and to improve the railway's service to the public."

On the basis of this factual finding, the agency concluded that the purchase would enable the Frisco Railroad to use the motor service involved to public advantage in its own operations (page 319). At the same time the Commission recognized that experience might give rise to the necessity for the future imposition of specific conditions to achieve the required statutory limitations upon Transportation Company's purchased authority. The agency therefore imposed the following condition upon its approval (page 319):

> "Provided that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary to or supplemental to the train service of said railway company."

The application of Transportation Company to acquire the "Hamm" route came before the Commission in *Frisco Transportation Company—Purchase—Hamm*, 15 M.C.C. 320 (1938). The Commission (Div. 5) made the identical findings as to Transportation Company's intent to operate a coordinated rail-truck service as it made in connection with the "Cooper" purchase (page 321), and on such basis concluded that the purchase of the "Hamm" route would meet the re-

quirements of Section 213(a)(1). The Commission also conditioned its approval upon the same reservation of authority to impose future conditions upon the operation as the agency provided in the "Cooper" purchase (page 322).

Transportation Company's application for approval of its purchase of the "Parker" and the "Tolson" routes came before the Commission (Div. 5) in *Frisco Transportation Company—Purchase—Joseph W. Parker*, 25 M.C.C. 96 (1939). At page 99 of its report approving the purchase, the Commission made the following finding as to the type of service which Transportation Company proposed to operate if its purchase was approved:

> "Considerable evidence was offered showing the manner in which coordinated rail-truck service would be rendered similar in character to that described in *Frisco Transp. Co.—Purchase—Hamm, supra*, and many resulting benefits to the public are of record."

On this basis the Commission concluded (page 100) that the purchase would meet the requirements of Section 213(a)(1). It also imposed upon its approval of the purchase the identical reservation of authority to restrict the operations in the future as was placed upon its approval of the "Cooper" and "Hamm" purchases (page 100).

The application of Transportation Company to purchase the "Bennett" route came before the Commission (Div. 5) in *Frisco Transportation Company—Purchase—Bennett*, 35 M.C.C. 802 (1940). The agency without an opinion adopted the examiner's recommendation that it be approved and that authority be re-

served to impose future conditions to insure an auxiliary or supplemental operation.

The orders in these cases, as do all Commission orders, approved and authorized the purchases subject to the terms and conditions set out in the findings in the reports.

Transportation Company took no exceptions to the findings or conditional approvals in the above cited acquisition proceedings and consummated the transactions pursuant to such approval. (R. 2-8, 173).

Between March and July, 1939 "compliance orders" were issued by the Commission which set forth the authority to be embodied in the certificates to be issued to Tranportation Company pursuant to the agency's approval of the purchases of the "Cooper", "Hamm", "Tolson", and "Parker" routes. (R. 167). There was omitted from these orders the reservation of authority contained in the Commission's reports and orders approving the purchases to subject operations thereunder to such further limitations or restrictions as the Commission might find necessary to insure that the service be auxiliary to or supplemental of the Frisco Railroad's train service. (R. 167). The certificates subsequently issued pursuant to these "compliance orders" also omitted this reservation of authority. (R. 167). A certificate was issued to Transportation Company covering the "Bennett" route without a prior compliance order, which did contain the reservation of authority. (R. 165).

In July, 1941, prior to issuance of the certificates, a group of nine motor carriers operating in the same area as Transportation Company filed a complaint with the Commission alleging that such carrier's operations violated the Interstate Commerce Act and

agency orders. The burden of the complaint was that Transportation Company was performing a direct motor service in contravention of the conditions under which it was authorized to purchase its operating rights. (R. 167). The complaint came before Division 5 of the Commission in *Campbell Sixty-Six Express, Inc., et al.* v. *Frisco Transportation Company, et al.*, 43 M.C.C. 641. The Division made the following findings with respect to the operations of Transportation Company:

> 1. Transportation Company is engaged in performing an independent motor service of the same kind and character as is performed by motor carriers generally (page 647).
>
> 2. Transportation Company does not refute the claim that it is performing an independent motor service which is not auxiliary to or supplementary of the Frisco Railroad's train service (page 649).
>
> 3. Transportation Company's claim that its unrestricted service is beneficial is irrelevant since the issue before the Commission is whether the carrier has been authorized to perform only auxiliary and supplemental service to that of the Frisco Railroad. Transportation Company was not authorized to perform direct motor carrier service and should discontinue to do so (page 653).

Division 5 stated that the acquisition proceedings would be reopened to determine what conditions should be imposed to insure that Transportation Company's operations be auxiliary to or supplemental of the Frisco Railroad's service (page 653).

Transportation Company appealed the Division 5 decision to the full Commission in *Campbell Sixty-Six Express, Inc., et al.* v. *Frisco Transportation Company, et al.*, 46 M.C.C. 223 (1946), which held that the carrier

had not violated the terms of its certificates in its operations because the restrictions contained in the report and orders approving the purchases of the operations had been omitted from those certificates. The Commission stated, however, that its opinion did not mean that the certificates held by Transportation Company could not be corrected to reflect the intent of the findings in the acquisition proceedings or that restrictions could not now be imposed upon the Company's certificates which would have the effect of limiting service thereunder to that which is auxiliary to or supplemental of the Frisco Railroad's train service (page 225). Nor did the Commission disagree with Division 5's conclusion that in approving the acquisitions, the Commission had intended to limit the purchased operations to those which were auxiliary to or supplemental of the Frisco Railroad's train service.

Thereafter, on January 4, 1945, Division 5 reopened the acquisition proceedings for reconsideration and the issuance of an examiner's proposed report therein. (R. 196, 197). This proposed report was issued on February 8, 1945. (R. 197-214). The report (R. 201) cited the findings made by Division 5 in each of the acquisition proceedings and concluded:

> "These findings plainly disclose an intent to authorize the Transportation Company to perform a service by motor vehicle which would be auxiliary or supplementary to the rail service of the Railway. Furthermore, this intent is confirmed by the discussion preceding the respective findings wherein the proposed operations are described as a means for developing coordinated rail-truck service with a view to improving the Railway's service to the Public. No other type of service is mentioned in these discussions and hence, there is no basis for inferring that the findings authorize any

other type of service than that discussed. The fact that the Commission reserved the power to impose future limitations, restrictions, or modifications in order to insure the operation of auxiliary or supplemental service certainly presupposes the authorization of this type of service only. This conclusion remains true even though this authorized type of service was not specifically described as auxiliary or supplementary in the language of condition 1 in the findings in the finance proceedings. To remove any doubt as to the type of service which the Transportation Company is authorized to perform, the Commission should impose appropriate conditions pursuant to its reservation of power to impose future limitations, restrictions, or modifications."

The report then recommended specific conditions similar to those ultimately imposed in order to carry out the Commission's intent. (R. 214-217).

On March 29, 1945, Transportation Company filed exceptions to the report and requested a hearing to enable it to present certain new matters referred to in the exceptions, but not then of record. (R. 218, 226, 529). The Commission thereafter reopened the proceedings for further hearing. (R. 218-220). At the hearing, Transportation Company moved for discontinuance of the proceedings and presented evidence in support thereof. Also, at the request of the examiner, the Company presented evidence as to its operations and those of the Frisco Railroad. (R. 223-227).

On May 17, 1948, the hearing examiner served his report which proposed that conditions be imposed on the certificates of Transportation Company in question to insure that the service rendered thereunder shall in the future be limited to that which is auxiliary to or supplemental of the Frisco Railroad's rail serv-

ice. (R. 528-553). Transportation Company excepted to the examiner's recommendations, which were then reviewed by Division 5. In *Frisco Transportation Company Extension—Joplin-Miami,* 53 M.C.C. 415 (1951), the Division sustained the examiner and ordered that the Company's certificates be conditioned as recommended. (R. 559-589). The principal argument advanced by the Company for the rejection of the examiner's report was the claimed lack of power in the Commission to impose conditions on the carrier's certificates. However, the Division disagreed and made, *inter alia,* the following findings: (R. 570-576)

> (1) It is clear that Transportation Company's purchases of the routes in question were approved by the Commission solely to enable the carrier to perform an auxiliary and supplemental service and "the reports in each case clearly imply an intent and expectation that all motor operations not in aid of the rail service would not be undertaken."
>
> (2) The certificates in issue may not authorize operations greater than approved in the acquisition proceedings and to the extent that they do so were inadvertently issued and may be corrected to reflect the approved operation.

Transportation Company appealed the decision of Division 5 to the full Commission which sustained it. *Frisco Transportation Company—Extension— Joplin-Miami,* 62 M.C.C. 367 (1953).[4] The Commission held that the omission of the reservation from the "Cooper", "Hamm", "Tolson", and "Parker" certificates did not prevent it from reopening the acquisition cases to impose specific conditions on the operations covered by those certificates so as to insure that such operations are auxiliary to or supplemental of the Frisco Pail-

[4] R. 593-615.

road's train service. The agency set forth these conclusions as follows: (R. 603, 604)

> "We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the Division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. Under these circumstances the certificates may be revoked, and certificates in accordance with such findings issued without proceeding in accordance with the provisions of Section 212(a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved."

The Commission therefore concluded that it might properly revoke or amend the certificates and issue new ones containing a reservation of authority and then proceed to consider what conditions should be imposed pursuant to such reservation. It decided, however, that such a course would be unnecessarily cumbersome since it had already had a hearing for the purpose of determining what conditions or limitations, if any, should be imposed. (R. 604). It thus proceeded directly to consider this question and to impose the conditions at issue on the certificates. (R. 604-610).

The Commission further held that the decision in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951) clearly established the power of the agency to similarly condition the "Bennett" certificate since authority to do so was reserved in the certificate. (R. 598, 599).

Thereafter, the Commission denied Transportation Company's petition for reconsideration (R. 18-20) and the carrier filed its complaint in the District Court (R. 1-15) to enjoin, set aside, suspend, and annul the agency's order.

The Railway Labor Executives Association et al.[5]

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[5] The Railway Labor Executives Association is composed of the following twenty-two standard international and national railway labor organizations, duly designated under the Railway Labor Act as the representatives of the bulk of the nation's rail employees including those of the Frisco Railroad:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen of America
Brotherhood of Railroad Trainmen
Brotherhood Railway Carmen of America
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees
Brotherhood of Sleeping Car Porters
Hotel & Restaurant Employees and Bartenders International Union
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
International Organization Masters, Mates & Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railroad Yardmasters of America
Sheet Metal Workers' International Association
Switchmen's Union of North America
The Order of Railroad Telegraphers.

The Association was joined in the motion to intervene by the Brotherhood of Railroad Trainmen and the Order of Railway Conductors and Brakemen, which were not then, but now are, members of the Association.

filed a motion to intevene in the proceedings as parties defendant representative of the Frisco Railroad's employees whose job security was protected by the Commission's order. This motion was granted by the three-judge statutory court convened to hear the complaint (R. 27) as provided in Sections 2321-2325 of the Judicial Code (28 U.S.C. 2321-2325)[6].

The District Court sustained the validity of the Commission's action in imposing conditions on the "Bennett" certificate on the authority of *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419. (R. 165).[7] However, the majority of the three-judge court held that the Commission's action in imposing conditions on the "Cooper", "Hamm", "Tolson", and "Parker" certificates constituted an invalid revocation or change in such certificates. The court based this holding upon the decision in *Watson Bros. Transportation Co.*, 132 F. Supp. 905, aff'd *per curiam*, 350 U.S. 927 (R. 168-170). The majority also held that in any event, it was not persuaded that the omission of the reservation of authority to impose further conditions from the certificates in question was the result of clerical error, and that the Commission's finding of inadvertence was not supported by the evidence. (R. 170-172).

District Judge Moore filed a dissenting opinion. (R. 173-175). This dissent rejected the view that *Watson*

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[6] This Court recently recognized the legal interest of rail employees in Commission orders dealing with the subject matter here involved and the status of the Association as a proper party to prosecute that interest in judicial proceedings involving such orders. *American Trucking Assoc. et al.*, v. *United States*, 355 U.S. —, 2 L. ed. 2d 158, 160 (1957).

[7] Transportation Company has not appealed this part of the District Court's judgment.

Bros. Transp. Co. v. *United States* was controlling. The dissent stated that there was nothing in that decision to indicate that this Court had changed the views expressed in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, sustaining the power of the Commission to revise motor carrier certificates issued to a railroad subsidiary in acquisition proceedings in order to insure that operations thereunder be supplemental to or auxiliary of the parent railroad's train service. Judge Moore further expressed the view that the omission from the certificates covering the four route segments of the reservation of authority contained in the reports in the acquisition proceedings was in fact a clerical error on the part of the Commission and not, as the majority found, the result of an intentional decision by the Commission to reverse the determinations made in those proceedings.

SUMMARY OF ARGUMENT

1. The court below erred in holding that the decision in *Watson Bros. Transportation Company* v. *United States*, 132 F. 2d 905, aff'd *per curiam*, 350 U.S. 927 (1956), established the invalidity of the Commission's action. This Court in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, reserved for future consideration the circumstances under which the Commission could impose conditions upon motor carrier certificates of a railroad-affiliate covering purchased operations to insure that such operations are auxiliary to or supplemental of the parent railroad's train service where no authority to do so is reserved in the certificate. *Watson* was not such a case. In the present case, the Commission reserved authority to impose the conditions in its reports and orders approving the purchases based on findings

that Transportation Company intended to operate a coordinated rail-truck service. It inadvertently omitted the reservation from the certificates issued pursuant to such reports and orders. The correction of the certificates by the Commission is consonant with established legal principles, past Commission practice, and the practice of other Federal agencies. Transportation Company could acquire no vested interest in the error because it was on legal notice that Section 213 (a)(1) of the statute permitted the Commission to authorize only an auxiliary and supplemental operation and had notice in fact of its limited authority through the reservation contained in the acquisition reports and orders which were final and binding upon it.

2. The decision of the majority below that the omission of the reservation was not inadvertent, but a deliberate reversal of Division 5, is contrary to the provisions of Section 17 of the Interstate Commerce Act, which make Division 5 reports and orders the final orders of the Commission unless reconsideration thereof is sought from the full Commission. Transportation Company did not seek reconsideration of the Division reports and orders approving the purchases including the reservation of authority to impose future auxiliary and supplemental conditions. Hence the issuance of the certificates to cover the purchased operations was purely a ministerial act to reflect the Division approval and the Commission correctly held that to the extent the certificates did not reflect the Division approval, there was an error in their preparation and issuance.

3. It is the position of appellants that there was no need for the Commission to amend the certificates of Transportation Company to insert the reservation of authority therein. The reservation in the opinions and

orders approving the purchases was legally sufficient to support a subsequent imposition of auxiliary and supplemental conditions. Such a reservation is simply a notice to the carrier that its operation is subject to certain statutory limitations and that it may be necessary in the future for the Commission to impose specific conditions to keep the operation within those limitations. Such a notice is just as adequate in orders approving a purchase as in a certificate issued pursuant to such an order, particularly since the certificate can legally give nothing more than is approved by the acquisition order.

4. The decision below is erroneous because it validates an operation which the Commission had no statutory power to authorize. Section 213(a)(1) and its successor Section 5(2)(b) plainly permit the purchase of motor carrier operations by railroad-affiliates only to the extent that the railroad itself can use the motor service to public advantage in its own train service. The Commission with judicial approval has translated this requirement into a rule that the motor carrier service must be auxiliary to or supplemental of the train service. Thus any approval of a railroad-affiliate purchase of motor carrier service carries with it this implied limitation. The Commission has no discretion at all to apply or not to apply the limitation. Any attempt to grant unlimited operating rights to a railroad-affiliate in a certificate covering purchased motor carrier operations is ultra vires and ineffective for that purpose. Thus, the Commission's action amounted to no more than making the certificates conform to the implied statutory limitation that had been present from the beginning.

ARGUMENT

The Commission's reports and orders which were the subject of the complaint below, decided (1) that the omission of the reservation of authority to impose future conditions contained in the reports and orders approving the "Cooper", "Hamm", "Tolson" and "Parker" purchases from the certificates subsequently issued to cover those operations was inadvertent; (2) that the Commission had authority to correct this inadvertence by issuing amended certificates containing the reservation; and (3) the conditions here involved should be inserted in the certificates pursuant to such reserved authority.

The decision in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951) established that the Commission clearly has authority to impose conditions such as are here involved on a railroad-affiliate motor carrier operation acquired by purchase where authority to impose auxiliary and supplemental conditions is reserved in the certificate issued to cover the operation. The case therefore boils down to the question of (a) whether the Commission had authority to amend the certificates to insert a reservation inadvertently omitted, and (b) whether the omission was in fact inadvertent. In addition, appellants urge that the Commission's action was correct in any event because the reservation of authority in the opinions and orders approving the purchases is a sufficient basis to later impose specific conditions regardless of whether it is inserted in the certificate. This is particularly true since the Commission had no power under the statute to give Transportation Company unrestricted rights over the routes involved and its action merely brought the operations into conformity with the statutory requirements.

I.

The Commission Had Authority to Amend the Certificates Involved to Include a Reservation of Authority to Impose Future Auxiliary and Supplemental Conditions Which It Inadvertently Omitted Therefrom

The majority below held that the amendment of Transportation Company's certificates covering the "Cooper", "Hamm", "Tolson", and "Parker" routes to insert therein a reservation of authority to impose future auxiliary and supplemental conditions and the imposition of specific conditions pursuant to such authority, was a revocation or modification of the certificates contrary to the requirements of Section 212(a) of the Interstate Commerce Act even though the reservation had been included in the reports and orders approving the purchases of the routes and had been inadvertently omitted from the certificates. This holding was based on the authority of *Watson Bros. Transportation Company* v. *United States,* 132 F. Supp. 905, aff'd *per curiam,* 350 U.S. 927 (R. 168-170).

District Judge Moore in his dissenting opinion rejected the majority view that the *Watson* case was dispositive of the Commission's action on the ground that this Court had left open such question in the *Rock Island* case. Judge Moore stated in dissent:[8]

> "I cannot accept the view of the majority that the Watson Bros. Transportation Co. case is controlling. The basis for my view is that the 'power to modify' issue which the Watson case is supposed to have settled was expressly reserved by the Supreme Court in the Rock Island case, *supra.*

[8] Judge Moore also made the point in his dissent that the language of Rule 16-1(e) of this Court's rules under which the *Watson* decision was affirmed was persuasive that the affirmance rested on the lack of notice and hearing involved, a problem not here present. (R. 174).

'This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such procedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected.' 340 U.S. 419, 445.' "

This view of the dissenting Judge is clearly correct. The *Watson* case involved a Commission attempt to revise a certificate issued to a motor carrier under Section 207 of the Interstate Commerce Act (49 U.S.C. 307) so as to take away a specific operating authority granted by the certificate. The decision holding that such an effort involved an attempted revocation or modification of a certificate contrary to the provisions of Section 212(a) clearly has no relevancy to the issue of the power of the Commission to impose auxiliary and supplemental conditions upon certificates covering motor carrier operations of a railroad subsidiary purchased subject to the requirements of Section 5(2)(b). This Court certainly could not have intended by affirming the *Watson* decision on motion to have decided the issue it reserved in the *Rock Island* case for a full statement and argument of all affected interests.

Upon consideration of the issue in the present case, appellants submit that there is no rule of law or equity which would prevent the Commission from correcting an inadvertent omission of a reservation of authority from a certificate issued to a railroad-affiliate pursuant to the approval of a purchase under Section 5(2)(b).

It is a generally recognized rule that relief will be granted against mistakes even in the case of judgments. 19 *Am. Jur.*, Equity, Section 51. This principle has been embodied in Rule 60 of the Federal Rules of Civil Procedure. (Fed. Rules Civ. Proc. rule 60, 28 U.S.C.A.). Paragraph (a) of the rule permits corrections in clerical mistakes in judgments and orders at any time upon motion or upon the initiative of the court. Paragraph (b) permits a party to be relieved from a final judgment or order because of mistake or inadvertence upon a motion made within one year.[9]

The Commission has consistently exercised authority pursuant to such principle to amend certificates which inadvertently did not reflect the terms of the orders directing or approving their issue. *Kenosha Auto Transport Corp.—Interpretation of Certificate,* 53 M.C.C. 85, 89 (1951); *Gray—Extension—General Commodities,* 52 M.C.C. 459, 460 (1951); *Petroleum Carrier Corp.* v. *Black,* 51 M.C.C. 717, 720 (1950); *A. C. E. Transp. Co. Inc.—Interpretation of Certificate,* 47 M.C.C. 202, 203 (1947).

The same authority has been exercised by the Civil Aeronautics Board under a statutory scheme[10] modelled upon the Interstate Commerce Act and under which the Board exercises power similar to that of the Commission. *Pan American Airways—North Atlantic Route Amendments,* 7 CAB 849 (1947). In the cited

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[9] The error here made was clearly a clerical one by the Commission's staff of the type covered by paragraph (a). In any event, the complaint against Transportation Company's operations was filed within a year of the issuance of the certificates.

[10] Civil Aeronautics Act, 49 U.S.C. 401 et seq.

case, the Board, after notice and hearing, amended a certificate issued to Pan American which had inadvertently, contrary to the findings in the Board's opinion granting the certificate, contained authority to serve Bermuda on a transatlantic air route.[11] The Board's reasoning as to its authority (7 CAB 852) is directly applicable to the present case:

> "There is nothing to preclude an administrative agency from correcting by a *nunc pro tunc* action inadvertent errors made in putting into appropriate documentary form the decisions taken by such agency. To rule otherwise would be in substance to legalize the retention of money or property paid under mistake. For a franchise for unlimited service from Washington and Boston to Bermuda is a matter of considerable monetary value to Pan American and may involve, through the necessity of mail pay, considerable financial loss to the Government—to say nothing of impairing the value of a franchise granted to another carrier, Colonial Airlines, for one of these routes, after considerable and painstaking scrutiny by the Board."

The only possible reason for not permitting the Commission to correct the inadvertent omission of the reservation of authority from Transportation Company's certificate would be a vested interest in the error acquired by the carrier through *bona fide* reliance thereon. There is and can be no such reliance here.

It is clear, appellants believe, that the Commission had no statutory authority under Section 213(a)(1) to issue to the Transportation Company certificates which would permit it to operate unrestricted motor

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[11] The Board's action was approved by the President under Section 801 of the Civil Aeronautics Act. (49 U.S.C. 601).

services without regard to the parent railroad's train service. (See discussion *infra*, pages 37-41). This limitation of the statute is set forth in plain unambiguous language so that the carrier could hardly plead ignorance. Appellants do not perceive how Transportation Company could acquire a vested interest in an authorization which was invalid *ab initio* if it meant what the carrier claimed it meant. In addition, the findings of the Commission (Div. 5) in the acquisition proceedings and the inclusion of the reservation of authority to impose future auxiliary and supplemental conditions in the reports and orders in those proceedings, put the carrier on clear notice of the limitations. These reports and orders became final and binding on the carrier when it did not appeal them to the full Commission. (Section 17(1), (4) of the Interstate Commerce Act, 49 U.S.C. 17(1), (4)).

If Transportation Company had any genuine doubt about the situation in the light of the reservation of authority in the acquisition reports and orders, it could easily have been cleared up through discussion with the Commission. The Civil Aeronautics Board rejected a claim of carrier reliance on an error in a certificate with the following words which are equally applicable to Transportation Company in the present situation:[12]

> "Again, Pan American is an active participant in many proceedings before the Board. Its counsel are in frequent contact with the Board and it is completely familiar with the tenor of proceedings before the Board. In the *Latin American Air Service* case, in which Pan American was a par-

[12] *Pan American Airways, North Atlantic Route Amendments*, 7 CAB 849, 852 (1947).

ticipant, the Board in authorizing one carrier, Colonial Airlines, Inc., to operate between Washington and Bermuda, gave extended consideration in its opinion (6 C.A.B. 857, 886-889), to the factors of public convenience and necessity which justified such conclusion. In the light of that action, taken less than a month prior to the Board's action in the *North Atlantic Route* amendment case, it would be unreasonable for the carrier to believe that the Board had authorized service between Boston and Bermuda, Philadelphia and Bermuda, Baltimore and Bermuda, Chicago and Bermuda, Detroit and Bermuda, and second-carrier service between Washington and Bermuda, without customary and detailed findings in its opinion supporting public convenience and necessity. *Had there been some reasonable basis for doubt with regard to this matter—and at the very least the evidence leads to the existence of a patent ambiguity—the exercise of ordinary and prudent judgment would have led this carrier in view of its constant and almost daily contact with the Board, to make some inquiry of the Board as to the extent of the rights it now seeks to assert and exercise under this certificate.* No such inquiry was made before schedules formally announcing the inauguration of service to Bermuda from Washington and Boston were filed." (Emphasis supplied)

Transportation Company was thus in no position to set up any claimed equities as a bar to the recognized principle that a tribunal may correct its mistakes. That principle should be given full effect in this case.

II.

The Omission of the Reservation of Authority from the Certificate Was in Fact an Inadvertent Error

The opinion below also raises the question of whether the omission of the reservation of authority was in fact inadvertent.

The hearing examiner who reconsidered the matter under the original order of Division 5 reopening the acquisition proceedings, reviewed the history of those proceedings and concluded that the Commission had never intended to grant Transportation Company unlimited rights. (R. 201, 202)

A different examiner conducted the hearings requested by Transportation Company, again reviewed in detail the acquisition proceedings (R. 531-539), and in his report concluded as follows: (R. 539, 540)

> "Turning now to the certificates: The entire Commission, reversing division 5, has found that so long as they remain unrestricted, that is so long as the reserved right to restrict remains unexercised, all-motor operations by the Transportation Company not connected with rail service are not unlawful even though contrary to the intent of the division in authorizing the acquisition. But it does not follow from this holding that the reserved right to restrict cannot or should not now be exercised. Neither is the exercise of such right precluded by the fact that it is not specifically referred to or restated in four of the five certificates here involved. These certificates, being based upon the findings in the finance proceedings, cannot authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority contemplated by the findings, such deficiency or

deviation from the findings constitutes an inadvertent ministerial error in the preparation of the certificates. An error of this type may properly be corrected by the Commission in the manner here contemplated without proceeding in accordance with the provisions of section 212(a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any kind, is involved."

Division 5, upon exceptions to the examiner's report for a third time conducted a review and analysis of the acquisition proceedings (R. 562-570) and in its report sustaining the examiner concluded: (R. 570, 571, 573)

"Admittedly, in each of the finance proceedings above discussed the Transportation Company disclosed a desire, if permitted to do so, to continue all-motor services independently of the Railroad, but in each proceeding it built its case primarily on the Railroad's need for an auxiliary motor service which would enable it to improve its less-than-carload rail freight service and upon the public benefits to be derived from a coordinated motor-rail service. And in each case the Commission, division 5, following then well established precedents disapproved the proposed independent all-motor operations and approved the proposed acquisition only to enable the Transportation Company to perform service auxiliary to or supplemental of the rail service of the Railroad, as is abundantly shown by the discussion in each report. In each instance, the finding that the purchase would be consistent with the public interest was clearly predicated upon the showing that the *Railroad* would be enabled thereby to use service by motor vehicle to public advantage in its *rail operations*. It is clear that the purchases were approved for no other purpose and the reports in

each case clearly imply an intent and expectation that all motor operations not in aid of the rail service would not be undertaken. Relying upon its declaration of its intent and expectation the division did not deem it necessary to impose specific conditions limiting the character of the future operations but to insure against the rendition by the Transportation Company of any other type of service than that intended the approval of the purchase was made subject, in each instance, to the unequivocal reservation of a right later to impose conditions should they be found necessary to prevent, in effect, a deviation by the Transportation Company from the auxiliary or supplementary service intended to be allowed despite what the Transportation Company might have hoped for respecting the performance of an all-out motor carrier service. Only by reading into these reports language that is not there can it be concluded that such an operation was even seriously considered, much less approved."

* * * *

The certificates here in issue, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority contemplated by the findings, such deficiency or deviation from the findings was inadvertent and the findings in the finance reports, were inadvertently issued."

Finally, upon appeal of the Division 5 decision, the full Commission once again undertook a similar review (R. 596; 597, 600) and concluded (R. 603) that the reservation of authority to impose future auxiliary and supplemental conditions contained in the reports and orders of the Commission (Div. 5) approving the

purchases involved had been inadvertently omitted from the certificates issued to cover the acquisitions.

In spite of this clear history and findings, the majority below accepted Transportation Company's argument that the omissions had not in fact been inadvertent, but had been the result of an intentional and deliberate reversal of the Division 5 reports and orders by the Commission and that the subsequent effort to insert the reservation in the certificates merely reflected a Commission change of policy. (R. 170-172.) The pertinent conclusions of the majority below on the issue of inadvertence were: (R. 171, 172)

> "The report of the finance hearing examiner as to the four routes was adopted by a divided division of the Commission, with one dissent. Who would say that the Commission is bound by the recommendations of the hearing examiner? The books are full of cases where the recommendations of the hearing examiners have not been followed, and yet the certificates are not the result of clerical errors. The Commission is not a rubber stamp for the conclusions of hearing examiners.
>
> Months after the approval of the finance report by a divided division, compliance orders were issued for the four routes. Thereafter, a certificate was issued for the Bennett route containing restrictions. A complaint was filed by competing carriers, complaining that the plaintiff was ignoring the restrictions of the finance hearing report, but thereafter the four certificates were issued. In the face of all of this, the Commission would have us believe that the purported changes are made as the result of clerical error."
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> * * * *
>
> Clerical errors should be readily apparent. Such is not the case here. Four of the members of the

Commission dissented and one took no part. Two of the commissioners wrote dissents setting out that in their opinion the record does not justify the finding of the majority of the Commission.

The arguments advanced here for the defense are the arguments of the minority opinion in the *Watson Bros.* case, supra. What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such."

These conclusion are founded upon a totally erroneous conception of the relationships between examiners, Divisions, and the full Commission and are contrary to the statutory provisions regulating Division and Commission action.

An Interstate Commerce Division is a creature of the Interstate Commerce Act. Section 17(1) thereof (49 U.S.C. 17(1)) provides for the creation of such divisions as follows:

"(1) The Commission is hereby authorized by its order to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary, which may be changed from time to time. Such divisions shall be designated, respectively, division one, division two, and so forth, or by a term descriptive of the principal subject, work, business, or function assigned or referred to such divisions. The Commission may designate one or more of its divisions as appellate divisions. Any Commissioner may be assigned to such division or divisions as the Commission may direct, and the senior in service of the Commissioners constituting a division shall act as chairman thereof unless otherwise directed by the Commission. When a vacancy occurs in any division or when a Commissioner because of absence,

or other cause, is unable to serve thereon, the Chairman of the Commission or any Commissioner designated by him for that purpose may serve temporarily on such division until the Commission otherwise orders."

Paragraph (2) of Section 17 authorizes the Commission to refer any of its work, business, or functions to Divisions. Paragraph (4) provides for reports and orders by Divisions and states that such reports and orders shall have the same force and effect as if issued by the Commission:

"(4) A division, an individual Commissioner, or a board shall have authority to hear and determine, order, certify, report, or otherwise act as to any work, business, or functions, assigned or referred thereto under the provisions of this section, and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission, and be subject to the same duties and obligations. The secretary and seal of the Commission shall be the secretary and seal of each division, individual Commissioner, or board. Except as otherwise provided in this section, any order, decision, or requirement of a division, an individual Commissioner, or a board, with respect to any matter so assigned or referred, shall have the same force and effect, and may be made and evidenced in the same manner as if made or taken by the Commission."

Paragraphs (6) through (9) of Section 17 provide for the appeal of Division reports and orders to the full Commission for rehearing, reargument, or reconsideration. Paragraph (8) provides that upon such an appeal the Division order shall be stayed.

Transportation Company took no appeal to the full Commission from the reports and orders of Division 5

in the acquisition proceedings. (R. 2-8, 173) Thus, the *statute* made such reports and orders, including the reservation of authority to impose auxiliary and supplemental conditions, final and binding on the carrier. The Commission clearly never had before it the question of whether it should reverse Division 5 and grant Transportation Company unlimited rights. Nor could it legally have such issue before it in the absence of an appeal and could not have reversed Division 5 through the language used in the certificates even if it had so desired. The Commission pointed out this fact in its report which is here involved as follows: (R. 603)

> "May the findings of each of the finance proceedings specifically authorizing the approval of the purchase subject to the limitation be changed so as to eliminate any condition contained in the findings, except through a formal supplemental report, report on reconsideration, or a modifying order in the specific proceeding authorizing the said purchase? We think not. It would neither be fair nor equitable to the parties to the proceeding or to the general public to permit any such change other than in the manner specified. There has not been any type of report or order modifying the findings in any of the finance proceedings listed in part II of appendix A. The compliance order issued in each of the five proceedings sets forth the operating rights which the Transportation Company had been authorized to purchase, and in each instance omitted the limitation. In other words, each of the compliance orders and of necessity the certificates based thereon authorized operations greater than those for the performance of which the division authorized the purchase."

Thus, the issuance of the certificates was clearly a clerical and ministerial process to reflect the Division orders and could not legally be anything else. Division

5 in its report on reconsideration set forth this process as follows: (R. 572, 573)

> "We may, of course, take official notice of our administrative procedures and practices. The preparation of certificates is a duty assigned to our Section of Certificates. Upon adoption, reports and orders approving the issuance of certificates automatically and routinely go to this section. After the lapse of the prescribed time for filing petitions, the clerical employees of this section having no discretionary authority insert on a form containing mimeographed stock paragraphs the authority described in the findings of the report, namely, the commodities (if the transportation of property is involved), the origin and destination, routes, and restrictions or conditions, if any. They are concerned only with the findings and not with the text of the report, and their sole function is to transpose the substance of the findings onto the certificate form, making such changes in language as may be required to conform to the wording customarily used in certificates. They have no authority to add to, or detract from, the findings or to make any change therein even though the text of the report should show a discrepancy. In the latter event, corrective action may be taken only by the Commission or a division thereof through a formal supplemental report, report on reconsideration, or a modifying order. In performing this clerical duty, the employees in question exercise no judgment, discretion, or interpretative power as to the character of authority being certificated other than to call to our attention any patent discrepancies they discover. Their drafting of the certificate is not reviewed except by a supervisor also without discretionary authority solely to insure a correct reflection of the findings."

There is consequently no legal basis for Transportation Company's contention and the District Court's

conclusion that the certificates reflected an intentional reversal of Division 5 by the Commission. Under the circumstances, the omission could not be anything other than a clerical error.

The problem of the Commission in determining the existence of such error was not a matter of resolving factual issues, but of exercising a judgment based on its knowledge of the statute and its own procedures.

Transportation Company is equally charged with knowledge of the statutory procedures and there was no reasonable basis for it to assume that the Commission had deliberately reversed Division 5 by omitting the reservation from the certificates.

The assumption of the majority below that the conditions which the Commission imposed reflected a change in policy is equally erroneous. This argument was advanced in the *Rock Island* case and rejected (340 U.S. at page 442) on the ground that the conditions were an appropriate means of implementing the statutory requirements made pursuant to a reservation of authority.

III.

The Commission Action Was Validly Taken Pursuant to an Effective Reservation of Authority

The Commission grounded its action on the conclusion that it had inadvertently omitted from the certificates the reservation of authority to impose future auxiliary and supplemental conditions and that it had authority to correct the omission and then proceed to impose the conditions. However, appellants urge that the reservation of authority in the reports and orders of Division 5 approving the acquisitions was in and of

itself a sufficient legal basis for the subsequent Commission action without the necessity of placing the reservation in the certificates.

There is no reason in law or equity to hold such reservation ineffective simply because it does not appear in the certificate finally issued. Such a reservation is not in and of itself a restriction, but simply a notice to the applicant that his operation is subject to certain statutory limitations and that it may be necessary for the Commission in the future to impose conditions to keep the operation within those limitations. The question of whether the reservation should be in the certificate should not therefore turn on some abstract theory of the sanctity of a certificate, but on whether under the circumstances, the reservation gave adequate notice to the carrier of future possibilities.

Transportation Company's only argument that it was not adequate notice is that the subsequent omission of the reservation from the certificates reasonably led it to believe that the Commission had reversed Division 5 and approved the purchase of an unrestricted operation. Appellants have set forth above, pages 30-35, why this argument is without substance. The reservation in the opinions and orders approving the purchases clearly put Transportation Company on notice that its acquisitions were in fact limited by the proviso in Section 213(a)(1). These reservations were ample authority for the Commission's subsequent imposition of specific conditions to carry out the reservation.

IV.

The Decision Below Validates an Operation that the Commission Has No Statutory Authority to Approve

An affirmance of the decision below means the validation of an unrestricted independent motor carrier service by a railroad subsidiary without regard to its relationship to the parent railroad's train service in contravention of the clear requirements of Section 5(2)(b) and its predecessor Section 213(a)(1). The statute permits the Commission to approve the purchase of motor carrier services by railroads or their subsidiaries only to the extent that the *rail carrier* can utilize such motor carrier operations to public advantage in its train service. The Commission with judicial approval has translated this statutory requirement into a rule that the motor service must be auxiliary to or supplemental of the train service and has developed specific conditions to insure such an operation, *American Trucking Assoc. et al.* v. *United States*, 355 U.S. —, 2 L. ed. 158, 162:

> "By § 5(2)(b), which was formerly § 213(a)(1) of the Motor Carrier Act of 1935, the Congress authorized consolidation, merger, acquisition, or lease of carriers if found by the Commission to be 'consistent with the public interest.' However, in transactions involving a motor carrier where a railroad or its affiliate is an applicant, the Congress directed the Commission 'not [to] enter such an order unless it finds that the transaction proposed' not only is in the public interest but 'will enable such [railroad] carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.' The Commission has interpreted this mandate of the

> Congress to confine acquisition of a motor carrier by a railroad or its affiliate to 'operations . . . which are auxiliary or supplementary to train service.' We specifically approved this long administrative practice in United States v. Rock Island Motor Transit Co. (US) supra. It will be remembered that the acquisitions of the White Line and Frederickson routes by Motor Transit, wherein 'auxiliary or supplemental' restrictions were imposed, were pursuant to this section of the Act."

Thus, the Commission had no statutory power whatsoever to grant Transportation Company certificates to operate motor carrier services over the segments involved which were not auxiliary to or supplemental of the Railroad's train service.

There has been confusion throughout this proceeding on this point by reason of the fact that the Commission, with the understanding reluctance of all agencies to concede away jurisdiction, has not made this limitation on its authority clear. However, the Commission itself has recognized that it has no discretion in applying the standards of the proviso in Section 5(2)(b) to routes acquired by purchase. Thus, in *Cincinnati, N. & C. Ry. Co.—Control—Lehigh Valley Transit,* 57 M.C.C. 41 (1950), the Commission stated: (pages 49 and 52)

> "Applicants further contend that, assuming applicants are affiliated with the railway, it is not necessary that we find that the motor-vehicle service of the carriers of which control would be acquired would be used to public advantage by the railway in its operations because the literal requirements of the proviso of section 5(2)(b) can

be relaxed in order to carry out the declared national transportation policy.* * *

* * * * *

"Apparently applicants concede that they are unable to submit evidence sufficient to meet the proof requirements of the proviso of section 5(2)(b), the application contains no such evidence, and it is not apparent to us how those requirements can be met in view of the location of the railway, the nature of the service which it renders, and the location of the motor bus carriers which the partnership would indirectly control. We do not agree with the position of applicants that we are empowered to relax the specific requirements of the statute and find that this transaction would be consistent with the public interest, without also finding that the railroad would be enabled to use service by motor vehicle to public advantage in its operation. As stated in E.T.&W.N.C.M. Transportation Co.—Lease—Imperial Transp. Co., Inc., 5 M.C.C. 196: 'Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation.'"

This Court's statement in the *American Trucking Associations* case, quoted *supra,* page 37, clearly confirms such view of the limitations on railroad-affiliates in Section 5(2)(b) proceedings. That case goes on to recognize that in Section 206 and Section 207 certificate cases involving railroad-affiliates, the Commission has some small degree of discretion in applying the legal standards of Section 5(2)(b) in that it may "occasionally" depart from the auxiliary and supplementary limitations upon the basis of special public interest factors. (2 L. ed. 165). However, no such discretion

exists in proceedings under Section 5(2)(b), and any effort to exercise it would be invalid.[13]

Thus the Commission's action in issuing a certificate that authorized operations not permitted by the statute was ultra vires its statutory powers, and its subsequent imposition of conditions merely brought the certificate into conformity with the implied statutory limitation which had always been present. The Commission's action thus differs markedly from that involved in the *Watson* case where the agency had *statutory* power to grant the service it attempted to eliminate by amending the certificate.

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[13] In his separate opinion in *Schaffer Transportation Company* v. *United States*, 355 U.S. —, 2 L. ed. 117 (1957), at page 124, Mr. Justice Frankfurter set forth the existence of this difference between the Commission's authority under Section 5(2)(b) and Section 207 in the following language:

> "The Transportation Act of 1940 (amending the Interstate Commerce Act) grants to the Interstate Commerce Commission powers and imposes limitations upon their exercise in terms of greatly varying degrees of definiteness. As a consequence, the range of discretion left to the Commission and, correspondingly, the scope of judicial review of Commission orders greatly vary. Thus, our decision this day in Nos. 6 and 8, American Trucking Asso. v. United States [2 L. ed. 2d 158], is a striking illustration of the difference between the limitation to which the Commission is subjected in a proceeding under § 5(2)(b) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 USC § 5(2)(b), and the requirements of § 207 of that Act, as amended by 49 Stat. 551, 49 USC § 307, although both relate to motor carrier service by railroads."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the lower court involving the four certificates should be reversed and the Commission's orders affirmed.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

National Transportation Act of 1940 (49 U. S. C. 1 et seq.)

NATIONAL TRANSPORTATION POLICY (49 U. S. C., preceding sections 1, 301, 901 and 1001)

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

INTERSTATE COMMERCE ACT (49 U. S. C. 1 *et seq.*)

Section 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more car-

riers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

Section 5 (2) (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon

the terms and conditions, and with the modifications, so found to be just and reasonable: PROVIDED, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

SEC. 212 (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license; *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant

to the provisions of sections 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Section 213 (a) (1) [49 U. S. C. Section 313 (a) (1)] Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice as is required by section 205(f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing, such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier as defined in section 1 (3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5(8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest, enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FRISCO TRANSPORTATION COMPANY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI—EASTERN DIVISION

JURISDICTIONAL STATEMENT

ROBERT W. GINNAN,
General Counsel,
CHARLES H. TOBIN, JR.,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

December 8, 1967

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions (both majority and dissenting) of the United States District Court for the Eastern District of Missouri are reported at 153 F. Supp. 572, and are set forth in Appendix A to this Statement. The reports of the Interstate Commerce Commission are printed at 53 M. C. C. 415 (Report of Division 5) and 62 M. C. C. 367 (Report of entire Commission).[1]

[1] The Commission's report is reproduced as Appendix C in No. 636, *American Trucking Association, Inc., et al.* v. *Frisco Transportation Company*, and as Appendix D in No. 637, *Railway Labor Executives Association, et al.* v. *Frisco Transportation Company.*

JURISDICTION

The action was brought under 28 U. S. C. 1336 to set aside an order of the Interstate Commerce Commission. The judgment and findings and conclusions of the district court (attached as Appendix B) were entered on August 12, 1957, and notice of appeal was filed in that court by the Commission on October 10, 1957.

The jurisdiction of this Court to review the decision of the district court on direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by the following decisions: *United States* v. *Rock Island Co.*, 340 U. S. 419, and *United States* v. *Texas & Pacific Co.*, 340 U. S. 450

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix C.

QUESTIONS PRESENTED

Pursuant to what is now Section 5 (2) of the Interstate Commerce Act, the Commission authorized the wholly-owned subsidiary of a railroad to purchase the operating rights of several motor carriers. Each of the Commission's reports authorizing such purchases stated that its approval was "subject to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad and shall not unduly restrain compe-

tition." Thereafter, the Commission issued to such subsidiary motor carrier certificates of public convenience and necessity which did not contain this reservation of power to impose restrictions. The questions presented are—

1. Whether the Commission was empowered, after notice and hearing, to modify the certificates to include such restrictions in accordance with the reservations in its reports.

2. Whether the District Court erred in holding that the omission of the reservation from the certificates was the result of a change in the Commission's policy rather than of inadvertence or clerical error.

STATEMENT

Appellee, a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company, obtained its initial motor carrier operating authority in 1939 by purchasing, with Commission approval, the operating rights of existing motor carriers. Although in each of the Commission proceedings here involved appellee has indicated its desire to perform not only a coordinated rail-truck service but also an all-motor carrier service independent of the railroad, the Commission stated in each report that its approval of the purchase was "subject to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad and shall not unduly restrain competition."

Appellee took no exception to the reports, but notified[2] the Commission that it would consummate the approved purchases subject to the terms prescribed by the Commission. Appellee commenced operations within approximately 30 days of the date of each report. Thereafter, so-called "compliance orders"[3] were issued indicating the authority to which appellee was entitled as a result of the purchase transactions. In the preparation of these compliance orders, the Commission's Section of Certificates omitted the above-quoted reservation as prescribed in the Commission's reports. The certificates (issued beginning March 31, 1942) prepared from those compliance orders likewise omitted such reservations.

Prior to the issuance of the certificates, several motor carriers filed a formal complaint with the Commission alleging that appellee was performing a motor carrier service independent of the rail service. A hearing was held upon that complaint,[4] and resulted

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[2] The notifications were by letters which were filed in the correspondence section of the official record in each of the finance proceedings. They were submitted to the court as part of the record. The court held the correspondence not to be admissible but stated that consideration of the correspondence would not change the decision. (Conclusion of Law No. 18.)

[3] A preliminary order directing the issuance of the certificate upon compliance by the carrier within a stated period of time with statutory and regulatory requirements as to security for the protection of the public and publication of tariffs. See *Crescent Express Lines* v. *United States*, 320 U. S. 401, 404, fn. 2.

[4] The Commission reports on the hearing are reported as *Campbell Sixty-Six Express, Inc.* v. *Frisco Trans. Co.*, 43 M. C. C. 641 and 46 M. C. C. 222.

in the reopening of the purchase proceedings for the purpose of determining what, if any, specific conditions or restrictions should be imposed to remove all doubt concerning the character of the motor carrier operations which appellee was authorized to perform.

In the reopened proceedings, after a hearing, the Commission concluded that the unrestricted certificates had been inadvertently issued, and that it had the power to correct them. The Commission accordingly ordered the issuance of new certificates containing appropriate restrictions similar to those considered by this Court in *United States* v. *Rock Island Co.*, 340 U. S. 419, 425–426. The Commission was of the view that the certificate issued in each of the purchase proceedings could not ignore or eliminate any condition prescribed in the report except following a formal supplemental report, a report on reconsideration, or a modifying order in the specific proceeding authorizing the purchase. The Commission stated (62 M. C. C., at 374–375):

> It would neither be fair nor equitable to the parties to the proceeding or to the general public to permit any such change other than in the manner specified. There has not been any type of report or order modifying the findings in any of the finance proceedings * * *. The compliance order issued in each of the five proceedings sets forth the operating rights which the Transportation Company had been authorized to purchase, and in each instance omitted the limitation. In other words, each of the compliance orders and of necessity the certificates based thereon authorized operations greater than those

for the performance of which the division authorized the purchase.

We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. Under these circumstances the certificates may be revoked, and certificates in accord with such findings issued, without proceeding in accordance with the provisions of section 212 (a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved.

The lower court, relying solely upon *Watson Bros. Transp. Co.* v. *United States*, 132 F. Supp. 905, affd. 350 U. S. 927, held that the Commission's action was an attempt to revoke a duly issued certificate contrary to Section 212 (a) of the Interstate Commerce Act (49 U. S. C. 312 (a)), and that the failure to include the reservation of power in the original certificate was not the result of clerical error. The court stated (153 F. Supp. 578):

We are of the opinion that the four certificates cannot be cancelled as a result of the hearing conducted by the Commission since it was

not conducted under Section 212 of the Act * * *.

District Judge Moore, dissenting, stated that the *Watson* case was not controlling in a case involving a railroad-affiliated motor carrier because this Court had expressly reserved the question in the *Rock Island* case, *supra*. Judge Moore was also of the view that this Court's summary affirmance in the *Watson* case was not on the inadvertence issue but rather on the lack of notice and hearing in that case. He was also convinced that the omission of the reservation from the initial certificate was, in fact, a clerical error.

THE QUESTIONS ARE SUBSTANTIAL

This case presents the important question of whether the Interstate Commerce Commission is empowered, after notice and hearing, to modify a motor carrier certificate of public convenience and necessity held by a rail affiliate so as to restrict its motor carrier operations to service auxiliary and supplementary to the rail service, where power to impose such restrictions was reserved in the Commission's report but was omitted from the certificate through inadvertence or clerical error. The question assumes particular importance here because the reservation involved was intended to enable the Commission to implement the purpose of the proviso in Section 5 (2) (b) to prevent railroad domination of motor transportation.

1. The court below held that the Commission's action in imposing such restrictions upon Frisco's motor carrier operations in accordance with a reservation stated in its reports but not in the certificates, constituted an

unauthorized revocation of the certificates in violation of Section 212 (a). We contend, to the contrary, that the Commission has power to correct or modify a certificate of public convenience and necessity to conform it to findings and conditions in the Commission's report which were the basis for the issuance of the certificate. Such a power is essential to fulfillment of the objectives of the Interstate Commerce Act, and in fairness to private parties.

At the time of the Commission's approval of the purchase transaction here involved, a proviso in Section 213 of the Motor Carrier Act (transferred by the Transportation Act of 1940 to Section 5 (2) (b) of the Interstate Commerce Act) provided that where a railroad, or its affiliate, sought to acquire a motor carrier, the Commission must find that such acquisition "will enable such [railroad] to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

As we pointed out in the Commission's brief in *American Trucking Association et al.* v. *United States et al.*, Nos. 6 and 8, now awaiting decision by this Court, the Commission has long held that, in the absence of unusual circumstances, motor carrier operations acquired by a railroad, or its affiliate, must be restricted to service which is auxiliary and supplemental to the rail service. The Commission's power to impose such restrictions was sustained by this Court in *United States* v. *Rock Island Motor Transit Co., supra.*

In the instant case, the reservation of power to impose auxiliary and supplementary restrictions upon

Frisco's motor carrier operations was designed to implement this statutory policy. The Commission's power to reserve the right to impose such conditions in the future, and thereafter to impose them, was also upheld by this Court in the *Rock Island* case.

Thus the Commission does not have an unrestricted power to authorize railroads and their affiliates to purchase motor carriers. Rather, in the proviso of Section 5 (2) (b), Congress has imposed affirmative requirements to prevent railroad monopolization of motor transportation. Neither the Commission nor the carriers may ignore these requirements or those of the National Transportation Policy. Similarly, we submit that this important Congressional policy is not revoked *pro tanto* by the omission of the reservation in question from Frisco's certificates, particularly where the Commission's reports gave notice of its purpose to Frisco.

We have no doubt that if the Commission had refused deliberately to give any weight to the policy of Section 5 (2) (b), its order would be set aside by the courts. Where the same result follows from inadvertence or clerical error in the preparation and issuance of certificates, the Commission should be permitted to modify such a certificate in accordance with a reservation of power to do so which was stated specifically in its report.

Moreover, fairness to competing carriers and other private parties requires that the Commission be empowered to correct errors in a certificate to conform it to the Commission's findings. Such a power is included in the broad command of Section 17 (3)

of the Act (made applicable to Part II by Section 205 (h)) that "The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

The practical necessity for such a power is emphasized by the fact that the Commission's report and order are served upon competing carriers and other parties to the proceeding before the Commission, while the subsequent certificate is sent only to the applicant. As the Commission states in its report, it would neither be fair nor equitable to the parties to the proceeding or to the general public to permit a material deviation from the findings in the report except through a formal supplementary report, a report on reconsideration, or a modifying order in the specific proceeding authorizing the purchase, 62 M. C. C., at 374, and with notice to all parties. In determining whether to seek judicial review of the Commission's action, such parties are entitled to assume that the certificate will not be broader than the findings and conditions in the Commission's report and order. Conversely, such modification of a certificate is not unfair to the holder, because the Commission's report gave full notice of its purpose from the beginning. With such notice, neither expenditures nor other purported reliance upon the terms of a certificate can give rise to an estoppel against the Commission or a denial of due process to the certificate holder. *United States* v. *Rock Island Motor Transit Co.*, 340 U. S., at 449.

We submit that the majority of the court below erred in concluding that the question is controlled by *Watson Bros. Transportation Co.* v. *United States*, 132 F. Supp. 905, summarily affirmed 350 U. S. 927. That case involved not only the question whether the Commission could correct an error in a certificate but also whether it could do so without giving notice and an opportunity for a hearing to the certificate holder. Thus, the affirmance by this Court did not necessarily deny to the Commission power to correct such errors where, as in the instant case, a hearing was held before modification of the certificate.

In *United States* v. *Seatrain Lines*, 329 U. S. 424, 428, this Court found it unnecessary to "determine the Commission's statutory power to correct clerical mistakes" in certificates. However, the holding in that case that there was no inadvertence or clerical error in the issuance of that certificate, is not controlling here where, unlike the *Seatrain* case, the Commission's report made clear its purpose to reserve power to modify the certificate. Moreover, this circumstance probably distinguishes the instant case from the question expressly reserved by this Court in the *Rock Island* case as follows (340 U. S., at 445–446):

> * * * This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such pro-

> cedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected. * * *.

That case involved in part the Commission's approval of the rail affiliate's purchase of the Frederickson motor carrier operating rights. There, neither the report nor order of the Commission authorizing the purchase referred to a reservation of power to impose auxiliary and supplemental conditions, and the Commission's action in imposing such conditions was sustained solely on the ground that a certificate had not been issued. Where a certificate has been issued without any notice of the Commission's purpose to impose future conditions, a later imposition of such conditions would present problems not present in the instant case.

2. The court below concluded that "no clerical error exists," and that "What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such." We submit that this conclusion is wholly untenable in view of the fact, as found by the Commission (53 M. C. C. at 424–425) that the physical preparation of certificates (and the issuance of compliance orders) is a routine function performed by subordinate employees of the Commission and not reviewed by the entire Commission or by a Division.

Any suggestion that the Commission deliberately ordered the issuance of certificates inconsistent with the findings and conditions in its reports is without sup-

port in the record and impeaches the integrity of the Commission's reports as the necessary basis for its orders. See *Florida* v. *United States*, 282 U. S. 194, and Section 8 (b) of the Administrative Procedure Act (5 U. S. C. 1007 (b)).

3. So far as we know, such errors in the issuance of certificates have been relatively few in number. However, the *Watson* case and the instant case show that they can occur in fairly important cases. In view of the wide range of Federal licensing activities, it is generally important to establish that Federal agencies have power to correct such inadvertent or clerical errors, such as the Federal courts possess under Rule 60 (a) of the Federal Rules of Civil Procedure.

CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,
CHARLIE H. JOHNS, JR.,
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Interstate Commerce Commission,
Washington 25, D. C.

APPENDIX A

In the United States District Court for the Eastern District of Missouri, Eastern Division

No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, A CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION ET AL., DEFENDANTS

Memorandum Opinion

Before VAN OOSTERHOUT, *Circuit Judge*, MOORE and HARPER, *District Judges*

Appearances:

John E. McCullough, Ernest D. Grinnell, Jr., A. J. Baumann, St. Louis, Missouri, appeared on behalf of the plaintiff, Frisco Transportation Company, a corporation.

Wayne H. Bigler, Asst. U. S. Attorney, St. Louis, Missouri, and Maurice A. Fitzgerald, Attorney, Department of Justice, Washington, D. C., appeared on behalf of the United States of America, defendant.

C. H. Johns, Asst. General Counsel, Interstate Commerce Commission, Washington, D. C., and Wayne H. Bigler, Asst. U. S. Attorney, St. Louis, Missouri, appeared on behalf of the Interstate Commerce Commission, defendant.

B. W. LaTourrette, St. Louis, Missouri, appeared on behalf of Viking Freight Company, Be-Mac Trans-

portation Company, C. E. S. Truck Lines, and L. A. Tucker Truck Lines, intervenors.

Peter T. Beardsley, Washington, D. C., appeared on behalf of American Trucking Association, Inc., and its Regular Common Carrier Conference, intervenors.

Carroll J. Donohue, St. Louis, Missouri, and James L. Highsaw, Washington, D. C., appeared on behalf of Railway Labor Executives Association, intervenors.

Wentworth E. Griffin, Kansas City, Missouri, appeared on behalf of Campbell "66" Express, intervenor.

HARPER, *Judge:*

This is an action by the Frisco Transportation Company, a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission entered on December 7, 1953, which order purports to cancel certain certificates, and at the same time new or amended certificates would be issued.

This court has jurisdiction of the subject matter of this action, 28 U. S. C. A. Sec. 1326, and the case was heard by a court composed of three judges pursuant to Sections 2321–2325, 28 U. S. C. A.

At issue in this proceeding is the propriety of the cancellation and reissue in restricted form of five operating certificates authorizing motor carrier operation by plaintiff in areas adjacent to those served by the Frisco Railroad. The Commission contends that four of these certificates issued in the year 1942 were incomplete in form in that they failed to include, due to a clerical error, a reservation of the power to restrict the operations of plaintiff by imposing limita-

tions designed to insure that plaintiff's motor carrier service would be auxiliary and supplemental to the parent company's rail service, the necessity and propriety of such reservations of power having been determined in the finance hearings conducted when plaintiff sought to purchase truck routes from those then operating them. Plaintiff denies that such certificates were in fact issued with an inadvertent omission of the reservation of power previously determined necessary, and asserts further that, even should this be the case, the Commission is without power to correct them at this time, its power in this respect being limited by Sec. 212 (a) of the Interstate Commerce Act, 49 U. S. C. A., Sec. 312 (a).

With respect to the fifth certificate (Bennett), the plaintiff asserts that the Commission is without power to restrict its operation.

Under consideration in the original hearings of 1938 and 1939 and in the reopened Commission proceedings beginning in 1945, which resulted in this action being brought, were six truck routes identified before us by the name of the vendor from whom purchase was authorized. These are the "Cooper" route from Joplin, Missouri, to Carthage, Missouri; the "Hamm" route from Joplin, Missouri, to Miami, Oklahoma; the "Tolson" route from Walnut Ridge, Arkansas, to Memphis, Tennessee; the "Parker" route from Blytheville, Arkansas, to Memphis, Tennessee; the "Rose" route from Hugo, Oklahoma, to Paris, Texas; and the "Bennett" route from Blytheville, Arkansas, to Lake City, Arkansas. In its reconsideration of the "Rose" certificate the Commission ordered no change. The operating certificate for the "Bennett" route was issued in 1940 with the recital of a reservation of power to impose additional restrictions on the scope of activities permitted under

the certificate, and hence, under the rule of *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, rehearing denied 341 U. S. 906, there can be little question of the power of the Commission to impose the restrictions which it has incorporated in the amended Bennett certificate. These restrictions are as follows:

1. The service to be performed by the Frisco Transportation Company, hereinafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, hereinafter called the Railway, except that this condition shall not apply with respect to Dyess, Ark.

2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Memphis, Tenn., and Amery-Tupelo (considered as one), Miss.

4. All contractual arrangements between the Transportation Company and the Railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the railway.

Determination of the propriety of the change made in the four remaining certificates requires a somewhat more detailed examination of the administrative history of the certificates which plaintiff seeks to retain unaltered. In 1938 and 1939, finance hearings were held by an examiner for the Commission with regard to the acquisition of truck routes by plaintiff, organized in 1937, to provide co-ordinated rail-motor carrier service. After the finance hearings on these four acquisitions the examiner made his report approving acquisition by plaintiff of the routes, but in each case concluded his report with the following language:

> * * * Provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereinafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said Railway Company and shall not unduly restrain competition.

Following the finance hearings, Division 5 of the Interstate Commerce Commission approved and adopted the report of the Hearing Examiner, with one commissioner dissenting. Following the action by Division 5 of the Commission, the plaintiff completed the purchase, and operations were commenced by the plaintiff in early 1939, and have continued without change as to the nature of or without interruption to the present time.

Thereafter, in June and July of 1939, compliance orders were issued by Division 5 of the Commission with respect to the four routes in question. The compliance orders do not contain the limitations contained in the findings in each of the finance proceed-

ings. In 1942, certificates were issued by the Commission to the plaintiff with respect to each of the four routes, which certificates do not contain the limitations contained in the findings in each of the finance proceedings.

In July 1941, before the issuance of the certificates under consideration, competing motor carriers filed complaints with the Commission alleging that plaintiff was operating a motor carrier service independent of parent Railway's rail service and in contravention of the condition imposed by the Commission in the finance hearings. Proceedings were had by the Commission to inquire into these complaints, and the Commission in 1946 concluded that plaintiff was not operating in violation of the terms of its certificates. The Commission indicated, however, that the ruling should not be taken as sanctioning such operation, since the proceedings pursuant to which the certificates in question were issued to the plaintiff had in fact already been re-opened for further hearing. The Commission had started these hearings in 1945, in Division 5, and Division 5 held that the operating certificates had been issued with an inadvertent omission of the proviso set out in the report of the finance hearings, and directed the cancellation and re-issue of the certificates.

Upon a petition for reconsideration presented to the full Commission, the matter was reheard by it in November 1952. A report of the Commission issued in December 1953, upheld the action of Division 5 in incorporating the restrictions in the operating certificates, in a divided opinion, four commissioners dissenting and one not participating. A petition for reconsideration was denied by the Commission in April 1955, and this action was commenced a month later.

A three-judge court, in *Watson Bros. Transportation Co.* v. *U. S.*, 132 F. Supp. 905 (Affirmed 350 U. S. 927), said, 1. c. 909:

> Counsel for the Commission argues that the order of August 25, 1953, merely corrects a clerical error in the certificate of July 19, 1949. Even if the court were to assume that the Commission has authority to correct clerical errors without notice and hearing, the result in this case would not be different, because it is the holding of the court that the order of August 25, 1953, is more than the mere correction of a clerical error; and is an attempt made contrary to Section 212 to revoke and change a certificate duly issued.

The court in the above language clearly indicates that certificates duly issued cannot be modified in the manner sought to be modified in the case before us, even though some prior report of the Commission indicates to the contrary. This is clearly borne out by the dissenting opinion of Judge Johnsen in that case, wherein he said, 1. c. 909–10:

> The effect of the majority opinion is to hold that, where the Commission has defined the scope of public convenience and necessity existing in a particular situation, by a finding such as the statute requires, but it has in some manner issued a certificate in excess of or contrary to the limits of the public convenience and necessity so found, it can not call in the certificate or engage in any correction or reissuance thereof, in order to make the certificate conform to its finding, unless it grants the holder a hearing.

The case before us with respect to the four certificates in question is a much stronger case on the part of the plaintiff insofar as the facts are concerned than the *Watson Bros.* case. Here intervening between the issuance of the finance report and the cer-

tificates in question, was issuance by the Commission of compliance orders, which did not contain the limitation contained in the findings in the finance proceedings. The action of the Commission in adopting the finance hearing report was not unanimous. Between the time that the compliance orders were issued and the four certificates were issued, a certificate was granted with respect to the Bennett route, in which the limitations were imposed. Thereafter, and before the certificates were issued by the Commission, proceedings were instituted by competing motor carriers, complaining that the restrictions set up in the finance hearing report were applicable and that the plaintiff was operating in contravention of those conditions.

After all of these things had occurred the four certificates in question were issued. We must bear in mind that insofar as the Commission is concerned, that the words "auxiliary to" or "supplemental of" are not taken from the Act as set forth in the *Rock Island* case, supra. At pages 433–34, the court said:

> But power in the Commission, before issuance of a certificate or approval of acquisition, to limit railroad motor operations so as to make them auxiliary and supplemental to rail service does not necessarily imply power to change the conditions designed to bring about the desired coordination, after issuance of the certificate. The parent railroad may have acquired or developed its motor affiliate in reliance on the conditions stated in the certificate.

The Commission in *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465, l. c. 472, said:

> We may issue decision upon decision and order upon order, on an application for a certificate so long as sufficient reason therefore appears and until all controversy is determined,

> but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding.

As was said by the Supreme Court in the *Rock Island* case, supra, l. c. 448:

> What slight bearing *Seatrain* has weighs on the side of the interlocutory character of the approval order. The sentence referred to reads;
>
> "But, as the Commission has said as to motor carrier certificates, while the procedural "orders" antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding."

Under the *Watson Bros.* decision, the action of the Commission is an attempt made contrary to Section 212 to revoke and change a certificate duly issued, and is more than the mere correction of a clerical error.

While the above disposes of the case, we are further persuaded that no clerical error exists. The functions of the reviewing court are exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Rochester Telephone Co.* v. *U. S.*, 307 U. S. 125; *Mississippi Valley Barge Line* v. *U. S.*, 292 U. S. 282.

In the *Mississippi Valley Barge Line* case, supra, l. c. 286–87, the Supreme Court said:

> The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.

The courts, however, have held in reviewing administrative orders that the orders must be supported

by evidence. In *Lang Transportation Corporation* v. *U. S.*, 75 F. Supp. 915, l. c. 924, the court said:

> Orders of the Interstate Commerce Commission which are contrary to and without adequate support in the evidence are void and have been consistently set aside by the courts. [Citing *Eastern Central Motor Carriers Association* v. *U. S.*, 321 U. S. 194; *Florida* v. *U. S.*, 282 U. S. 194; *Baltimore & Ohio Railroad Company* v. *U. S.*, 264 U. S. 258, and a number of district court cases.]

In the instant case the four orders last referred to are without adequate support in the evidence. The history of the case we have set forth above clearly demonstrates that what was sought to be accomplished here, at this late date, was to restrict the operations of the plaintiff, not because a clerical error had occurred, but based upon the question of whether or not such was desired. A statement by Examiner Croft, at page 59 of the transcript of the hearing, bespeaks as much when he said during the hearing, before testimony was introduced:

> Well, it is my assumption that if the Commission finds that restrictions are desirable, and if it concludes that it has authority to impose them at this time, they will put in restrictions similar to the so-called Kansas City Southern restrictions, including the condition 3, naming either key points or requiring an immediately prior or immediately subsequent rail haul. * * * In other words, I want information on which we can impose a workable restriction.

Where does this indicate that the restrictions will be the result of correcting a clerical error or that the hearing is about a clerical error? The report of the finance hearing examiner as to the four routes was adopted by a divided division of the Commission with

one dissent. Who would say that the Commission is bound by the recommendations of the hearing examiner? The books are full of cases where the recommendations of the hearing examiners have not been followed, and yet the certificates are not the result of clerical errors. The Commission is not a rubber stamp for the conclusions of hearing examiners.

Months after the approval of the finance report by a divided division, compliance orders were issued for the four routes. Thereafter, a certificate was issued for the Bennett route containing restrictions. A complaint was filed by competing carriers, complaining that the plaintiff was ignoring the restrictions of the finance hearing report, but thereafter the four certificates were issued. In the face of all of this, the Commission would have us believe that the purported changes are made as the result of clerical error.

While, as set out above, under the *Watson Bros.* case we are of the opinion that the four certificates cannot be canceled as a result of the hearing conducted by the Commission since it was not conducted under Sec. 212 of the Act, yet, if we agreed with the dissenting opinion in the *Watson Bros.* case, we would still be of the opinion in this case that the four certificates in question could not be canceled and reissued because no clerical error in fact existed. We would not overrule the actions of the Commission taken at the time that the compliance orders were issued, and the certificates were issued merely because the hearing examiner at the finance hearings would have put limitations on the certificates. For us to hold that the members of the Interstate Commerce Commission are bound by the recommendation of a hearing examiner in his report, a report that was adopted by a divided division, would be to hold that the members of the Commission could not have minds of their own.

Clerical errors should be readily apparent. Such is not the case here. Four of the members of the Commission dissented and one took no part. Two of the commissioners wrote dissents setting out that in their opinion the record does not justify the finding of the majority of the Commission.

The arguments advanced here for the defense are the arguments of the minority opinion in the *Watson Bros.* case, supra. What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such.

Judgement will accordingly be for the plaintiff with respect to the "Cooper", "Hamm", "Tolson" and "Parker" routes, and the action of the Commission confirmed with respect to the "Bennett" route. Attorneys for the plaintiff will prepare the appropriate Findings of Fact, Conclusions of Law and Judgment, and present same to the court for entry.

M. D. VAN OOSTERHOUT,
United States Circuit Judge.

United States District Judge.
ROY W. HARPER,
United States District Judge.

MOORE, *Judge:*

Reluctantly, I must dissent from the opinion of the majority, believing as I do that the Interstate Commerce Commission acted correctly. After examining the record, I am persuaded that the omission of the proviso from the operating certificates (other than the "Bennett" certificate) was, in fact, a clerical error on the part of the Commission and not, as plaintiff alleges, the result of an intentional decision to reverse

the determination made at the finance hearings at which both plaintiff and competing carriers participated and offered evidence. The unrestricted compliance orders which are at variance with the finance hearings, determinations were made without any hearing at which intervenor motor carriers might have been heard. The intervening motor carriers and the defendant Commission did not sleep on their rights in this matter. Protests were filed with the Commission even before the operating certificates were issued. I think it is significant that rail-affiliated motor carrier applications for authority to offer motor-carrier services to the public were a distinct minority of the total number of motor carrier service authorizations sought in the 'thirties and the 'forties; no doubt those charged with the responsibility of issuing compliance orders and operating certificates found it easy to omit the proviso which was required on only a few of the motor carrier certificates with which the Section of Certificates dealt. I think it is also noteworthy that plaintiff did not file a petition for reconsideration after the conclusion of the finance hearings, as was its right under the procedural rules of the Commission (I. C. C. General Rules of Practice, 101 (a)).

I cannot see that Transportation Company's case would be any stronger if I were in fact persuaded that the omissions from the finance orders and certificates were intentional. I do not see how plaintiff could justify changes in the Commission's findings made without giving notice, or an opportunity to be heard to those appearing at the acquisition proceedings (49 U. S. C. A. Sec. 305 (a)).

I cannot accept the view of the majority that the *Watson Bros. Transportation Co.* case is controlling. The basis for my view is that the "power to modify" issue which the *Watson* case is supposed to have set-

tled was expressly reserved by the Supreme Court in the *Rock Island* case *supra*.

> This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such procedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected (340 U. S. 419, 445).

The decision of the three-judge court in that case was affirmed in the Supreme Court on motion. Rule 16–1 (c) of the Revised Rules of the Supreme Court provides:

> The Court will receive a motion to affirm a judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument (1954, 346 U. S. 951, 964).

The language of this rule persuades me that the Supreme Court did not affirm the decision below on this inadvertence issue, but rather on the lack of hearing and notice. I believe the section of the Interstate Commerce Commission Act, Sec. 212 (a), which plaintiff offers in support of its position, is intended to prevent the Commission from making changes in certificates when such certificates have been lawfully issued in accordance with previous findings of the Commission made after due notice and hearing. I do not think that, for example, if in these administrative proceedings the Section of Certificates had erroneously issued a certificate of authority to an intervenor motor

carrier instead of to Frisco Transportation Company that such a mistake would permanently tie the hands of the Commission and thus nullify the previous findings made in the prior administrative hearings. On the issue of due process raised by the plaintiff I shall say only that I do not believe anyone can acquire an indefeasible interest in a mistake. I see no good reason in the absence of any clear legislative mandate to hold that so powerful an administrative agency as the Interstate Commerce Commission is unable to correct the clerical errors made by a subordinate entity not empowered to vary the findings and decisions of its creator.

Dated this 28th day of June 1957.

(Signed) GEO. H. MOORE,
United States District Judge.

APPENDIX B

In the United States District Court for the Eastern Judicial District of Missouri—Eastern Division

Civil Action No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, PLAINTIFF.

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Judgment

This cause came on for final hearing on the complaint herein, praying for a decree enjoining and restraining the United States and its agency, the Interstate Commerce Commission, from enforcing the order of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding bearing the principal caption of MC 89913 Sub. No. 1, Frisco Transportation Company Extension—Joplin-Miami, and the chief judge of the United States Court of Appeals for the Eighth Circuit having called to the assistance of the Honorable George H. Moore, to hear and determine this cause, the Honorable Martin D. Van Oosterhout, Judge of the Court of Appeals for this Circuit, and the Honorable Roy W. Harper, Judge of the United States District Court for the Eastern District of Missouri, Eastern Division, pursuant to Section 2281 of Title 28 of the United States Code, and said cause and the evidence therein having been heard before said three judges, it is

Ordered, adjudged, and decreed that the United States of America and its agency, the Interstate Commerce Commission, be and they are hereby en-

joined from enforcing the second ordering paragraph of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding bearing the principal caption MC–89913 Sub. No. 1, Frisco Transportation Company Extension—Joplin-Miami, and said second ordering paragraph is hereby forever set aside, suspended and annulled. The relief sought by plaintiff in connection with its certificate bearing No. MC–89913 (Sub. No. 10) is denied, and the Interstate Commerce Commission's Order with respect thereto is affirmed.

Dated August 9, 1957.

/s/ MARTIN D. VAN OOSTERHOUT,
United States Circuit Judge.

/s/ ROY W. HARPER,
United States District Judge.

GEORGE H. MOORE,
United States District Judge, dissenting.

In the United States District Court for the Eastern Judicial District of Missouri—Eastern Division

Civil Action No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Findings of Fact and Conclusions of Law

Findings of Fact

1. (*a*) Plaintiff, Frisco Transportation Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business in the City of St. Louis, Missouri.

(*b*) United States of America is named a defendant pursuant to Section 2322 of the Judicial Code, 28 U. S. C. A., Section 2322.

(*c*) The Interstate Commerce Commission intervened as a defendant in accordance with the provisions of Section 2323 of the Judicial Code, 28 U. S. C. A., Section 2323.

(*d*) Be-Mac Transport Company, Inc.; Viking Freight Company, C. E. S. Truck Lines, Inc.; L. A. Tucker Truck Lines, Inc.; Consolidated Forwarding Company, Inc.; American Trucking Associations, Inc. and its Regular Common Carrier Conference; Railway Labor Executives Association; Brotherhood of Railroad Trainmen; Order of Railway Conductors and Brakemen of America; and Campbell "Sixty-Six" Express, Inc. were allowed to intervene as parties defendant after the filing of appropriate petitions for leave to intervene.

2. Plaintiff is a common carrier by motor vehicle engaged in the transportation of persons and property in interstate and intrastate commerce, and is a wholly owned subsidiary of the St. Louis-San Fransisco Railway Company, a common carrier by rail subject to the Interstate Commerce Act.

3. In this suit we are asked to review an order of the Interstate Commerce Commission cancelling certain operating certificates of plaintiff bearing the numbers MC 89913 Sub. No. 1 (Hamm), MC 89913 Sub No. 3 (Cooper), MC 89913 Sub. No. 5 (Parker), MC 89913 Sub. No. 6 (Tolson), and requiring the issuance of new or amended certificates in lieu thereof. We are also asked to review the same order insofar as it modifies a certificate of plaintiff bearing number MC 89913 Sub. No. 10 (Bennett). The names in parentheses are the parties from whom plaintiff purchased the operating rights represented by these cer-

tificates. These names will some times be used in referring to the certificates in these findings and conclusions.

4. The proceedings before the Commission also involved plaintiff's certificate bearing number MC 89913 sub No. 2 (Rose), but since the Commission did not order any modification of that certificate, no action by this Court is necessary on the portion of the order dealing therewith. Therefore, the remaining findings of fact do not apply to that certificate.

5. On October 17, 1939, plaintiff filed an application to purchase a portion of the motor carrier operating rights and property of Bennett. After hearings were held, the Commission approved said purchase on March 15, 1940. A memorandum decision reporting this approval appears in 35 MCC 802. On June 13, 1940, the Commission granted plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 10, authorizing plaintiff to engage in interstate or foreign commerce as a common carrier by motor vehicle over the operating rights purchased from said Bennett, which said certificate contained the following:

> The operations herein authorized are subject to such further limitations, restrictions, or modifications as the Commission may hereafter find it necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the St. Louis-San Francisco Railway Company, and shall not unduly restrain competition.

6. During the years 1938 and 1939, plaintiff filed applications to purchase the motor carrier operating rights and properties of Hamm, Cooper, Parker and Tolson. After finance hearings were held, Examiner's Proposed Reports were issued in connection with each of these applications, which Reports ap-

proved the purchase by plaintiff of the operating rights and properties of these motor carriers and concluded with the following language:

> * * * Provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereinafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said Railway Company and shall not unduly restrain competition.

7. Division 5 of the Interstate Commerce Commission approved and adopted the Reports of the hearing Examiners, with one Commissioner dissenting in each case. These Reports appear as follows: Hamm—15 M. C. C. 320; Cooper—15 M. C. C. 317; Parker—25 M. C. C. 96; Tolson—25 M. C. C. 96.

8. Following the action by Division 5 of the Commission, plaintiff completed the purchases, and operations were commenced by the plaintiff in early 1939, and have continued without change as to the nature of or without interruption to the present time.

9. On March 11, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Cooper, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued its order (commonly referred to as a "compliance order") in Docket MC 89913 Sub. No. 3, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Joseph D. Cooper, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On March 31, 1942, the Commission granted

to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 3, including inter alia the operating rights purchased from Cooper, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

10. On March 14, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Hamm, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 1, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by John Hamm, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On March 31, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 1, including inter alia the operating rights purchased from Hamm, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

11. On June 16, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Parker, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 5, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority

previously applied for by Joseph W. Parker, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On April 18, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 5, including inter alia the operating rights purchased from Parker, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

12. On July 10, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Tolson, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 6, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Louis Tolson, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On April 18, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 6, including inter alia the operating rights purchased from Tolson, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

13. In July 1941, prior to the issuance of the certificates of public convenience and necessity in Cooper, Parker, Hamm and Tolson, competing motor carriers filed complaints with the Commission, alleging that plaintiff was operating a motor carrier service independent of its parent railroad's rail service and in

contravention of the condition imposed by the Commission in the finance hearings. After appropriate proceedings, the Commission concluded in 1946 that plaintiff was not operating in violation of the terms of its certificates (46 M. C. C. 222). The Commission's opinion indicated that the ruling should not be taken as sanctioning such operation since the proceedings pursuant to which the Hamm, Cooper, Parker, and Tolson certificates were issued to plaintiff had been reopened for further hearing.

14. The proceedings which resulted in the Commission's order of December 7, 1953, had their beginning on January 4, 1945, when the Commission entered an order reopening for reconsideration the proceedings by which plaintiff acquired the Hamm, Cooper, Parker, and Tolson certificates.

15. On April 8, 1946, such reopened proceedings were heard by a hearing Examiner. During that hearing, the hearing Examiner made the following statement:

> Well, it is my assumption that if the Commission finds that restrictions are desirable, and if it concludes that it has authority to impose them at this time, they will put in restrictions similar to the so-called Kansas City Southern restrictions, including the condition 3, naming either key points or requiring an immediately prior or immediately subsequent rail haul. * * * In other words, I want information on which we can impose a workable restriction (59 of Transcript).

16. On May 17, 1948, a recommended report and order on further hearing was filed by Examiners William T. Croft and Beverly S. Simms.

17. After exceptions were filed, Division 5 of the Commission issued its report on further hearing on October 22, 1951. This report appears in 53 M. C. C. 415.

18. After plaintiff filed a petition for reconsideration of the report of Division 5, the Commission reopened the proceedings for oral argument, and after such argument, the Commission modified the report of Division 5 by its report of December 7, 1953, which appears in 62 M. C. C. 367. The order under attack was entered pursuant to this report.

19. Plaintiff's petition for reconsideration of this report and order was filed on February 2, 1954, and was denied by the Commission on April 4, 1955.

20. Plaintiff filed this suit on May 20, 1955, and on the same date a temporary restraining order was entered which enjoined the enforcement of the order of December 7, 1953, and the order of April 4, 1955.

21. The facts as to the various steps in the handling of this case beginning in 1938 and extending through the issuance of the certificates in 1942, as stated in findings of fact 6–13 inclusive herein, do not support the Commission's finding that such certificates were issued in their unrestricted form as a result of a clerical error or errors. Rather, a complete examination of the record fails to disclose any evidence that a clerical error in fact existed in the issuance of the certificates in question.

22. There was no evidence of record before the Commission which could be used as a basis for finding that a clerical error existed in the issuance of plaintiff's certificates bearing numbers MC 89913 Sub. No. 1, MC 89913 Sub. No. 3, MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6.

Conclusions of Law

1. This is an action to enjoin, set aside, suspend, and annul an order of the Interstate Commerce Commission entered on December 7, 1953 (62 M. C. C. 367), which order purports to cancel certain operating certificates of plaintiff and at the same time issue new or amended certificates.

2. This Court has jurisdiction of the subject matter of this action, 28 U. S. C. A., Sec. 1326, and the case was heard by a Court composed of three judges pursuant to 28 U. S. C. A., Sec. 2321–2325.

3. Since the Commission did not order the cancellation or modification of the certificate bearing number MC 89913 Sub. No. 2 (Rose), no action by this Court is necessary in connection with the certificate bearing that number.

4. The Commission's action with respect to the certificate bearing number MC 89913 Sub. No. 10 (Bennett) was within its powers in view of the reservation of the power to impose additional restrictions on the scope of activities permitted under the certificate, and hence, under the rule of *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, rehearing denied 341 U. S. 906, the Commission's action with regard to that certificate is affirmed and no injunction should issue as to that part of the order.

5. Plaintiff's certificates bearing the numbers MC 89913 Sub. No. 1 (Hamm); MC 89913 Sub. No. 3 (Cooper); MC 89913 Sub. No. 5 (Parker); MC 89913 Sub. No. 6 (Tolson) were duly issued.

6. The granting of a motor carrier certificate by the Commission marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. *Smith Bros. Revocation of Certificate*, 33 M. C. C. 465, 472.

7. Motor carrier certificates duly issued cannot be modified in the mann r in which plaintiff's certificates in this case were sought to be modified by the Commission, even though some prior report indicates the contrary. *Watson Brothers Transportation Company* v. *U. S.*, 135 F. S. 905 (affirmed 350 U. S. 927).

8. Section 212–(a) of the Interstate Commerce Act, 49 U. S. C. A. Section 312–(a), sets forth the only

basis for revocation of a motor carrier certificate as follows:

> Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder * * *.

9. The action taken by the Commission in cancelling the Hamm, Cooper, Parker, and Tolson certificates on the ground that said certificates were "inadvertently issued", is an attempt made contrary to Section 212 of the Interstate Commerce Act to revoke or change a certificate duly issued, and is more than the mere correction of a clerical error.

10. Orders of the Interstate Commerce Commission must be supported by adequate evidence. *Lang Trans-*

portation Corp. v. *U. S.*, 75 F. S. 915, 924; *Eastern Central Motor Carriers Assn.* v. *U. S.*, 321 U. S. 194; *Baltimore & Ohio Railroad Company* v. *U. S.*, 264 U. S. 258; *Florida* v. *U. S.*, 282 U. S. 194.

11. The finding in the order of December 7, 1953, that the Hamm, Cooper, Parker, and Tolson certificates were "inadvertently issued" is without adequate support in the evidence.

12. Clerical errors must be readily apparent, and the alleged clerical errors in this case are not apparent.

13. Failure by the Commission to follow Examiner's proposd report is not a sufficient showing to prove that a clerical error existed.

14. The issuance of compliance orders as found in findings of fact 9, 10, 11 and 12, and the existence of a pending complaint challenging plaintiff's right to operate over these certificates as found in finding of fact 13, together with the statement by the hearing Examiner as found in finding of fact 21, and the issuance in 1940 of a restricted certificate in connection with plaintiff's Bennett purchase, negate the existence of clerical error in the issuance of the Hamm, Cooper, Parker and Tolson certificates, and compel the conclusion that no clerical error existed in the issuance of those certificates.

15. The Commisison's order of December 7, 1953, as it applies to plaintiff's certificates bearing numbers MC 89913 Sub. No. 1, MC 89913 Sub. No. 3, MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6, should be enjoined, set aside, suspended and annulled because said order is contrary to the provisions of Section 212 (a) of the Interstate Commerce Act, 49 U. S. C. A. Section 312 (a).

16. In addition, because the Commission's finding that said certificates were issued as a result of clerical

error is without the support of adequate evidence, the order of December 7, 1953, as it applies to the certificates described in conclusion of law 15, should be enjoined, set aside, suspended and annulled.

17. Either of the reasons stated in conclusions of law 15 or 16 would be sufficient in and of itself to require that the order be enjoined, set aside, suspended and annulled.

18. Because of our conclusion as stated in conclusion of law 15, it has not been necessary for us to consider the additional evidence offered by plaintiff at the hearing before this Court. Our consideration has been limited to the record made before the Commission beginning with the January 4, 1945 order reopening for reconsideration the proceedings by which plaintiff acquired the Hamm, Cooper, Parker, Tolson, Rose and Bennett certificates, in accordance with the well-established principle that "* * * the validity of the order [of the Interstate Commerce Commission] must be determined upon evidence introduced before the Commission." *Louisville & Nashville Railroad Company* v. *United States,* 245 U. S. 463, 466. This principle requires that we give no consideration to matters not in the record before the Commission, but even were it proper for us to take into consideration matters such as those tendered by the Interstate Commerce Commission at the hearing before this Court, our conclusions as stated in conclusions of law 15 and 16 would not be different.

19. A permanent injunction should issue enjoining the enforcement of the provisions of the December 7, 1953, order as it applies to plaintiff's certificates bearing the numbers MC 89913 Sub. No. 1; MC 89913 Sub. No. 3; MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6.

20. No injunction should issue in connection with said order as it applies to plaintiff's certificate bearing the number MC 89913 Sub. No. 10.

(s) MARTIN D. VAN OOSTERHOUT,
United States Circuit Judge.

(s) ROY W. HARPER,
United States District Judge.

GEORGE H. MOORE,
United States District Judge, dissenting.

APPENDIX C

Statute Involved

National Transportation Act of 1940 (49 U. S. C., 1 et seq.)

National Transportation Policy (49 U. S. C., preceding sections 1, 301, 901, and 1001):

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

Interstate Commerce Act (49 U. S. C. 1 *et seq.*):

> SEC. 5 (2). (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the own-

ership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

SEC. 5 (2). (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable,

the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

SEC. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or

regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

SEC. 213. (a) (1) [49 U. S. C. Section 313 (a) (1)] Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice as is required by section 205 (f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing, such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier as

defined in section 1 (3) or Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5 (8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest, enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 651

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FRISCO TRANSPORTATION COMPANY, APPELLEE

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

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REPLY OF THE INTERSTATE COMMERCE COMMISSION TO APPELLEE'S MOTION TO AFFIRM

In reply to the appellee's motion to affirm the judgment, we would refer to two matters not included in our Jurisdictional Statement.

1. At page 13 of the Commission's Jurisdictional Statement, it is stated that "So far as we know, such errors in the issuance of certificates have been relatively few in number." Since then, there has been instituted in the United States District Court for the Middle District of Tennessee a suit entitled *Tompkins Motor Lines, Inc.* v. *United States and Interstate Commerce Commission* (Civil Action File No. 2436), alleging that in the course of clarifying a competing

motor carrier's certificate of public convenience and necessity, and without notice to the plaintiff, the Commission granted operating authority which had not been requested by the applicant or supported by evidence of public convenience and necessity. The Commission has decided, subject to this Court's action on this appeal, to reopen the application proceeding for a hearing to determine whether through error or inadvertence it issued a certificate broader than its findings and the supporting evidence. If, contrary to our view, the Commission is without power to correct such an error in a certificate, then the *Tompkins* case will present the question of whether the courts have the power to do so. While we concede that such a power to correct should reside somewhere, it would be anomalous to hold that the courts can require the Commission to do what it cannot do on its own initiative. Cf. *Murphy Motor Lines* v. *United States*, 148 F. Supp. 471, affirmed *per curiam* by this Court on October 14, 1957.

2. In the motion to affirm (p. 20) the appellee asserts that "There is literally no evidence in the record upon which a finding of inadvertence could be based. No employee of the Commission was called to describe the procedure followed in issuing the certificates." To the contrary, the Commission in its first report (53 M.C.C. at 424-425) took official notice of its own internal procedures under which the actual preparation and issuance of certificates is routinely performed by employees of the Commission who, of course, are without authority to issue a certificate broader than

the Commission's findings. We submit that the Commission or any other tribunal may take official (or judicial) notice of its own internal procedures. Moreover, this Court has emphasized repeatedly the inability in employees of the Commission or even in a member of the Commission to exercise powers vested only in the Commission. *Minneapolis & St. Louis R.R. Co. v. Peoria, etc. Ry. Co.*, 270 U.S. 580, 585; *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 146.

Respectfully submitted,

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January 23, 1958

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No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1958

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FRISCO TRANSPORTATION COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 19

INTERSTATE COMMERCE COMMISSION, APPELLANT,

v.

FRISCO TRANSPORTATION COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

MEMORANDUM FOR THE UNITED STATES

This appeal is from a judgment of a three-judge district court which set aside certain orders of the Interstate Commerce Commission. While the United States did not appeal from that judgment, the basis for its failure to appeal was not that it believed the district court's decision correct. The United States concurs in and adopts the grounds for reversal of the district court's judgment set forth in the brief filed by the Interstate Commerce Commission.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

AUGUST 1958.

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